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Supreme Court of the United States

OCTOBER TERM, 1964

No. 42

MORTIMER SINGER, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 9, 1964

CERTIORARI GRANTED APRIL 20, 1964

SUPREME COURT OF THE UNITED STATES

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[fol. A]

[File endorsement omitted]

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION**

February, 1961, Grand Jury

No. 29518 CD

UNITED STATES OF AMERICA, Plaintiff,

v.

STEPHEN FRANCIS SINGER and MORTIMER SINGER,
Defendants.

INDICTMENT—Filed March 1, 1961

[18 U.S.C. 1341—Mail Fraud]

The Grand Jury charges:

Count One

[18 U.S.C. 1341]

Beginning on or about July 1, 1957, and continuing to on or about March 15, 1959, defendants Stephen Francis Singer, also known as Larry Stevens and Steve Singer, and Mortimer Singer, also known as Ralph Hastings, devised, and intended to devise a scheme and artifice to defraud and to obtain money and property from amateur and inexperienced songwriters, lyric writers and composers (hereinafter called "said persons") by means of false and fraudulent pretenses, representations and promises.

Said scheme consisted of defendants' representation that they were operating a legitimate and well-established song [fol. B] servicing and marketing business, and that they would, in return for a service charge, be able to have songs, lyrics and other musical compositions arranged, orchestrated, edited, published, recorded, marketed and exploited

to the benefit of persons submitting to the defendants such materials.

Said persons were induced to send to the defendants money and property by means of false and fraudulent pretenses, representations and promises which the defendants well knew were false and fraudulent when made, including, but not limited to, the following:

1. That the Madhatters (a vocal group) had informed Ralph Hastings that they would be willing to record the songs of said persons at a session now being scheduled, and that they (the Madhatters) had requested that Ralph Hastings contact said persons.

2. That a Madhatters' recording of itself would develop interest on the part of publishers.

3. That the defendants would distribute records of said persons to selected radio disc jockeys and would notify record distributors as soon as the 45 rpm record of each of said persons was pressed, which pressing would be done upon the receipt by the defendants of \$94.00 for each song.

4. That the defendants would negotiate for publication of music for said persons with active, responsible publishing companies.

5. That the defendants were negotiating with a publisher that had placed under contract successful radio, television, recording and stage personalities, and that the defendants were issuing a series of song folios featuring these artists.

6. That the defendants had made available the Madhatters' recording to motion picture, radio and television studios.

Each and all of the aforesaid pretenses, representations and promises were false and fraudulent at the time they were made, as defendants well knew, and they were intended by the defendants so to be; and each and all were made in [fol. C] order to deceive and defraud the said persons.

As a further part of said scheme and artifice to defraud and for the purpose of obtaining money and property from said persons, the defendants Stephen Francis Singer and Mortimer Singer intended to, would, and did conceal from

the said persons certain material facts required for disclosure to the said persons, in order that they would not be misled and deceived by the statements made, and caused to be made, to them by the aforesaid defendants; and more particularly, the defendants intended to, would and did omit to state and furnish to the said persons material facts of the nature aforesaid, including, but not limited to, the following:

1. That the Madhatters had learned of the composition of said persons not from an independent publisher's agent as represented but from the defendants personally.

2. That amateur songwriters had not benefitted financially from their dealings with Mortimer Singer who had been engaged in the "music service" business since 1950.

3. That it was highly improbable that any of the songs submitted by said persons would be used in motion pictures.

4. That the defendants had not handled or acted as agents for "top" recording artists.

5. That the defendants, contrary to their implied representations, had never notified any of said persons as to the style of orchestration and the style of vocal arrangement best suited to the Madhatters.

6. That the Madhatters, contrary to the implied representations of the defendants, had never used any recordings of said persons as audition recordings for motion picture musicals.

7. That the defendants, contrary to their implied representations, had never successfully negotiated with any motion picture producer, television producer or radio sponsor in regards to the songs or recordings of any amateur songwriter.

[fol. D] 8. That the Madhatters, contrary to the implied representations of the defendants, had no intention of using the songs of said persons in their appearances at night clubs or as guest artists on radio or television.

9. That the defendants, contrary to their implied representations, had no regularly retained Director of Record-

ings" who independently made the necessary arrangements at the alleged scale rate of \$87.50 for orchestration and vocal arrangement.

10. That the defendants, contrary to their implied representations, had no motion picture studios nor any arrangements with any legitimate studio equipped to produce, distribute or market motion pictures.

11. That the defendants had paid royalties to few amateur songwriters during their business operations and that such royalties in any event had not exceeded 50 cents.

12. That the label "Film-Tone Records" was not listed in any recognized trade publication or directory.

13. That the decision to publish songs by the "publisher", Eagle Pass Music Publishing Co., was not due to the Madhatters' musical talents, as implicitly represented by the defendants, but rather to previous arrangements made by the defendants with Dallas Eugene Turner.

On or about January 23, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mr. Paul Brown, P. O. Box 89, Coquille, Oregon, to be sent or delivered by the Post Office Department of the United States.

[fol. E]

Count Two

[18 U.S.C. 1341]

The Grand Jury realleges the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about June 20, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a

letter addressed to Mr. Leroy Badiali, Route 70, Medford, New Jersey, to be sent or delivered by the Post Office Department of the United States.

[fol. F]

Count Three

[18 U.S.C. 1341]

The Grand Jury realleges all the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about July 15, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mrs. Verda Garrow, RFD #2, Morristonville, New York, to be sent or delivered by the Post Office Department of the United States.

[fol. G]

Count Four

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about February 10, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mrs. Florence K. Carlson, 920 East Chambers Street, Milwaukee 12, Wisconsin, to be sent or delivered by the Post Office Department of the United States.

[fol. H]

Count Five

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about February 8, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Miss Lucille Chance, 421 Chauncey Street, Brooklyn 33, New York, to be sent or delivered by the Post Office Department of the United States.

[fol. I]

Count Six

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about October 28, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Miss Patricia Dick, Route 2, Perry, Iowa, to be sent or delivered by the Post Office Department of the United States.

[fol. J]

Count Seven

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about June 9, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mr. Johnny O. Ramsey, 210 E. Marion Street, Paris, Missouri, to be sent or delivered by the Post Office Department of the United States.

[fol. K]

Count Eight

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about January 10, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mr. L. A. Shipman, 622 Morgan Street, Houma, Louisiana, to be sent or delivered by the Post Office Department of the United States.

[fol. L]

Count Nine

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about January 10, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Frank Wertz, 7th Street L St., Corso, Nebraska City, Nebraska, to be sent or delivered by the Post Office Department of the United States.

[fol. M]

Count Ten

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about October 10, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and

Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Miss Ann Young, 5906—40th Avenue, Kenosha, Wisconsin, to be sent or delivered by the Post Office Department of the United States.

[fol. N]

Count Eleven

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about July 29, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mr. J. A. Brewer, 931 Border Avenue, Ellwood City, Pennsylvania, to be sent or delivered by the Post Office Department of the United States.

[fol. O]

Count Twelve

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about September 12, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mrs. C. Bado, 420 Westmoreland Street, Takoma Park, Maryland, to be sent or delivered by the Post Office Department of the United States.

[fol. P]

Count Thirteen

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about January 23, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Miss Margarette Hardcastle, 1401 High School Street, Huntsville, Alabama, to be sent or delivered by the Post Office Department of the United States.

[fol. Q]

Count Fourteen

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about August 2, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Miss Audrey Hedberg, Box 176, Golden, B. C., Canada, to be sent or delivered by the Post Office Department of the United States.

[fol. R]

Count Fifteen

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about January 9, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and

Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mrs. Josephine Holmes, 134 Birch Street, San Antonio, Texas, to be sent or delivered by the Post Office Department of the United States.

[fol. S]

Count Sixteen

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about February 13, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mrs. Hester Perkins, Box 733, DeQuincy, Louisiana, to be sent or delivered by the Post Office Department of the United States.

[fol. T]

Count Seventeen

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about July 24, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mr. Paul Menchaca, 504 Thrasher Lane, Austin, Texas, to be sent or delivered by the Post Office Department of the United States.

[fol. U]

Count Eighteen

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about March 3, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, knowingly took and received mail matter delivered by the Post Office Department of the United States, to wit, an envelope addressed to Mr. Ralph E. Hastings, 7906 Santa Monica Boulevard, Hollywood, California, from F. T. Eversole, 10210 North Harrington Drive, Corpus Christi, Texas, containing an American Express Money Order in the amount of \$50.00, payable to Ralph E. Hastings.

[fol. V]

Count Nineteen

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about April 29, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, knowingly took and received mail matter delivered by the Post Office Department of the United States, to wit, an envelope addressed to Mr. Ralph E. Hastings, 7906 Santa Monica Boulevard, Hollywood, California, from Mr. Ray Lee, 4627 Madison Street, Kansas City, Missouri, containing a United States Postal Money Order in the amount of \$44.00 payable to Ralph E. Hastings.

[fol. W]

Count Twenty

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about August 6, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, knowingly took and received mail matter delivered by the Post Office Department of the United States, to wit, an envelope addressed to Mr. Ralph E. Hastings, 7906 Santa Monica Boulevard, Hollywood, California, from Mr. James Justice, Box 27, Solon, Ohio, containing a personal check in the amount of \$44.00 payable to Ralph E. Hastings.

[fol. X]

Count Twenty-one

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about June 28, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, knowingly took and received mail matter delivered by the Post Office Department of the United States, to wit, an envelope addressed to Mr. Ralph Hastings, 5634 Santa Monica Boulevard, Hollywood 38, California, from Mr. H. W. Taylor, 2935 Wylie Drive, Dallas 25, Texas, containing a personal check signed by Carolyn Taylor in the amount of \$77.50 payable to Ralph E. Hastings.

[fol. Y]

Count Twenty-two

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about January 16, 1959, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, knowingly took and received mail matter delivered by the Post Office Department of the United States, to wit, an envelope addressed to Ralph E. Hastings, 4714 Crenshaw Boulevard, Los Angeles 43, California, from Blanche Thomas, Route 1, Box 418, Monroe, Louisiana, containing a money order in the amount of \$22.00 payable to Ralph E. Hastings.

[fol. Z]

Count Twenty-three

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about October 23, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, knowingly took and received mail matter delivered by the Post Office Department of the United States, to wit, an envelope addressed to Mr. Ralph E. Hastings, 5634 Santa Monica Boulevard, Hollywood 38, California, from Mr. J. D. Beebe, Box 272, Higgins, Texas, containing a personal check signed by J. D. Beebe in the amount of \$94.00 payable to Ralph E. Hastings.

[fol. AA]

Count Twenty-four

[18 U.S.C. 1341]

The Grand Jury ~~realleges all of the~~ allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about January 19, 1959, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer

and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, knowingly took and received mail matter delivered by the Post Office Department of the United States, to wit, three envelopes addressed to Mr. Ralph E. Hastings, 4714 Crenshaw Boulevard, Los Angeles 43, California, from Mr. Rubin Bond, 924 Winter Street, Philadelphia, Pennsylvania, said envelopes containing United States Postal Money Orders in amounts of \$15.00, \$20.00 and \$15.00 respectively, all payable to Ralph E. Hastings.

[fol. BB]

Count Twenty-five

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about July 1, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, knowingly took and received mail matter delivered by the Post Office Department of the United States, to wit, an envelope addressed to Mr. Ralph E. Hastings, 7906 Santa Monica Boulevard, Hollywood 46, California, from Mr. John R. Brown, Jr., Route 3, Hamlin, Texas, said envelope containing a personal check in the amount of \$44.00 payable to Ralph E. Hastings.

[fol. CC]

Count Twenty-six

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about November 9, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, know-

ingly took and received mail matter delivered by the Post Office Department of the United States, to wit, an envelope addressed to Ralph E. Hastings, 7906 Santa Monica Boulevard, Hollywood 46, California, from T/Sgt. Elmer M. Sutton, 3201st Food Service Sq., Eglin Air Force Base, Florida, containing a money order dated November 18, 1958, in the amount of \$87.50 payable to Ralph E. Hastings.

[fol. DD]

Count Twenty-seven

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about April 9, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, knowingly took and received mail matter delivered by the Post Office Department of the United States, to wit, an envelope addressed to Ralph E. Hastings, 7906 Santa Monica Boulevard, Hollywood 46, California, from Mrs. Leola M. Thompson, P. O. Box 446, Rifle, Colorado, containing a personal check in the amount of \$87.50 payable to Ralph E. Hastings.

[fol. EE]

Count Twenty-eight

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about July 9, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, knowingly took and received mail matter delivered by the Post Office Department of the United States, to wit, an envelope addressed to Ralph E. Hastings, 7906 Santa Monica Boule-

vard, Hollywood 46, California, from Mrs. Leola M. Thompson, P. O. Box 446, Rifle, Colorado, containing a personal check in the amount of \$94.00 payable to Ralph E. Hastings.

[fol. FF]

Count Twenty-nine

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On, or about January 22, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, knowingly took and received mail matter delivered by the Post Office Department of the United States, to wit, an envelope addressed to Ralph E. Hastings, 7906 Santa Monica Boulevard, Hollywood 46, California, from Mr. Joseph Genova, 1142 Elm Street, Pueblo, Colorado, containing a United States Postal Money Order dated January 27, 1958, in the amount of \$87.50 payable to Ralph E. Hastings.

[fol. GG]

Count Thirty

[18 U.S.C. 1341]

The Grand Jury realleges all of the allegations of Count One of this indictment, except those contained in the last paragraph thereof.

On or about March 7, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Stephen Francis Singer and Mortimer Singer, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, knowingly took and received mail matter delivered by the Post Office Department of the United States, to wit, an envelope addressed to Ralph E. Hastings, 7906 Santa Monica Boulevard, Hollywood 46, California, from Mr. Harry Vogtman, 224 N. Spring Street, Klamath Falls, Oregon, containing a personal money order drawn on the

United States National Bank, Portland, Oregon, dated March 14, 1958, in the amount of \$44.00 payable to Ralph E. Hastings.

A True Bill

Glenn B. Allen, Foreman.

Laughlin E. Waters, United States Attorney.

[fol. HH] [File endorsement omitted]

Walter M. Campbell, Attorney at Law, 668 South Bonnie Brae Street, Los Angeles 57, California, HUBBARD 3-4170, Attorney for Defendants.

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION.

No. 29518 CD

UNITED STATES OF AMERICA, Plaintiff,

vs.

STEPHEN FRANCIS SINGER and MORTIMER SINGER,
Defendants.

TRIAL MEMORANDUM—Filed April 17, 1962

For the purpose of shortening the trial, the defendants herein make the following offers:

1. To waive their right to a trial by jury and to submit the evidence to the decision of this honorable court.
2. To stipulate that all writings and documents purporting to emanate from "Ralph E. Hastings" and bearing the signature "Ralph E. Hastings" either in typing, handwriting or mechanical reproduction did, in fact, emanate from

the firm known as "Ralph E. Hastings," and wherever pertinent were mailed through the United States mail to the addressee named therein at or about the time of the date thereon; that prepaid postage was placed thereon, and that said documents were in due course received through the United States mails by the addressee thereof, and that all of said documents may be received in evidence without further foundation of any kind or nature whatsoever.

Dated: April 16, 1962.

Respectfully submitted,

Walter M. Campbell, Attorney for the Defendants.

[fol. II]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Criminal Case No. 29518-CD

UNITED STATES OF AMERICA,

v.

MORTIMER SINGER.

JURY VERDICT—May 2, 1962

We, The Jury in the above-entitled cause find the defendant Mortimer Singer—

Guilty as charged in Count 1.

Guilty as charged in Count 2

Guilty as charged in Count 3

Guilty as charged in Count 4

Guilty as charged in Count 5.

Guilty as charged in Count 6
Guilty as charged in Count 7
Guilty as charged in Count 8
Guilty as charged in Count 9
Guilty as charged in Count 10
Guilty as charged in Count 11
Not Guilty as charged in Count 12
Guilty as charged in Count 13
Guilty as charged in Count 14
Guilty as charged in Count 15
Guilty as charged in Count 16
Guilty as charged in Count 17
Guilty as charged in Count 18
Guilty as charged in Count 19
Guilty as charged in Count 20
[fol. J.] Guilty as charged in Count 21
Guilty as charged in Count 22
Guilty as charged in Count 23
Guilty as charged in Count 24
Guilty as charged in Count 25
Guilty as charged in Count 26
Guilty as charged in Count 27
Guilty as charged in Count 28
Guilty as charged in Count 29, and
Guilty as charged in Count 30 of
the Indictment.

Henry G. Sagert, Foreman of the Jury.

Dated: at Los Angeles, California

This 2nd day of May, 1962.

[fol. KK]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 29518-CD

(Title 18, U.S.C. 1341)

UNITED STATES OF AMERICA,

v.

MORTIMER SINGER.

JUDGMENT AND COMMITMENT—August 27, 1962

On this 27th day of August, 1962 came the attorney for the government and the defendant appeared in person and¹ by his attorney, and the defendant making a statement in his own behalf before sentence

It Is Adjudged that the defendant has been convicted upon his plea of² not guilty and a verdict of guilty as charged in Counts Nos. 1 to 11, and from Counts 13 to 30, incl., in the Indictment of the offense of beginning on or about July 1, 1957 and continuing to on or about March 15, 1959, defendant devised a scheme and artifice to defraud and obtain money from amateur song-writers, and at various dates between those times to various persons in various places; defendant did use the United States mails in furtherance

¹ Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

² Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

of said scheme to defraud them, as charged³ in Counts 1 to 11, inclusive and 13 to 30, inclusive of the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴ eighteen (18) months in a jail-type institution on each of Counts Nos. 1 to 11, inclusive, and said sentences to run concurrently with each other and not to exceed eighteen (18) months in all; further, on Counts Nos. 13 to 30, inclusive, imposition of sentence of imprisonment is stayed and defendant placed on probation for a period of three (3) years on condition that he obey all laws, Federal, State and Municipal, and that he pay a fine unto the United States in the amount of \$250.00 on each of said Counts Nos. 13 to 30, inclusive, said fines being cumulative and totaling \$4,500.00 (Forty-five hundred Dollars) in all. Further, that stay of execution be granted to 2 P. M. September 24, 1962; further, that period of probation on Counts 13 to 30 to run concurrently and not to exceed three (3) years in all and said probation to start at the expiration of jail-term imposed on Counts Nos. 1 to 11, inclusive.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

³ Insert "in count(s) number

" if required.

⁴ Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

Leon R. Yankwich, United States District Judge.

Filed; this 27th day of August, 1962, John A. Childress, Clerk, by: L. Cunliffe, Deputy Clerk.

[fol. LL]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION
No. 29518-CD Criminal

UNITED STATES OF AMERICA,

v.

MORTIMER SINGER.

At: Los Angeles, Calif.

Present: Hon. Leon R. Yankwich, District Judge; Deputy Clerk: L. Cunliffe; Reporter: Evelyn Sweeney; U. S. Att'y, by Assistant U. S. Att'y Timothy Thornton, Esq.; Defendant present on bond; Counsel: Walter Campbell, Esq.

MINUTES OF THE COURT—August 27, 1962

Proceedings:

For sentence on Counts 1 to 11, and 13 to 30, inclusive, upon a verdict of guilty:

Counsel and defendant make statements before sentencing, argue defendant's motion for acquittal, heretofore taken under submission.

It Is Ordered that motion for acquittal be denied and defendant is committed to the custody of the Attorney General for a period of eighteen (18) months on each of Counts 1 to 11, inclusive, said sentences to run concurrently and not to exceed eighteen (18) months in all.

On counts 13 to 30, inclusive, defendant is ordered to pay a fine unto the United States in the amount of

\$250 on each count, said fines to be cumulative and not to exceed a total of \$4,500.00 in all, and further defendant is placed on probation for a concurrent period of three (3) years on each of these counts on condition that he obey all laws, Federal, State and Municipal, that he comply with all lawful rules of the Probation Officer and pay the fines imposed.

On defendant's motion, it is further ordered that bond on appeal remain at \$2,500.00 and that stay of execution be granted to 2 p.m., September 24, 1962.

John A. Childress, Clerk, By L. Cunliffe, Deputy Clerk.

(Y-8/27/62)

[fol. MM]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,284

MORTIMER SINGER, Appellant,

vs.

UNITED STATES OF AMERICA, Respondent.

On appeal from the United States District Court for the Southern District of California, Central Division.

OPINION—January 6, 1964

Before: Barnes and Merrill, Circuit Judges; and Burke, District Judge.

BURKE, District Judge:

Appellant, Mortimer Singer, was tried and convicted by a jury in the United States District Court, Southern District of California, on twenty-nine counts of an indictment charg-

ing thirty separate violations of the Mail Fraud Statute, 18 U.S.C. §1341.¹

[fol. NN] Counts One to Seventeen of the indictment charged "depositing" of mail in violation of Title 18 U.S.C. §1341, and counts Eighteen to Thirty charged "receiving" mail in violation of the same statute. The first count of the indictment set forth the nature of the alleged scheme and the remaining counts incorporated the details thereof by reference to Count One. The indictment charged that beginning on or about July 1st, 1957 and continuing to on or about March 15th, 1959 appellant devised a scheme to defraud and obtain money and property from amateur song writers, lyric writers and composers by means of false and fraudulent pretenses, representations and promises. The indictment further alleged that appellant falsely represented himself as the operator of a legitimate and well established song servicing and marketing business which could, and did, for a service charge have songs, lyrics and other musical compositions arranged, orchestrated, edited, published, recorded and exploited for the benefit of amateur song writers.

¹ 18 U.S.C. §1341 provides:

"Frauds and swindles

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both . . ."

After the indictment was returned appellant attempted to waive a trial by jury, but was unsuccessful because of the government's refusal to consent to such waiver.

This court has jurisdiction of the appeal under provisions of §1291(1), 28 U.S.C.

There are many specifications of error upon which appellant relies. The first is predicated upon the claim that an accused has a constitutional right to waive trial by jury and that to condition the right upon consent of the government is a denial of due process as provided by the Fifth Amendment to the Constitution.

Rule 23 of the Federal Rules of Criminal Procedure provides as follows:

"(a) Trial by Jury. Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.

[fol. 00] (c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially."

Acceptance of appellant's argument necessarily requires a conclusion that the unequivocal language of Rule 23(a) requiring consent of the government before an accused may waive trial by jury is unconstitutional. Although appellant's logic is not lacking some persuasive quality we are of the opinion that constitutionality of Rule 23(a) is well settled.² In accordance with the existing authorities we find no denial of due process in this case.

² *Taylor v. United States*, 142 F. 2d 808 (9th Cir. 1944), cert. den. 323 U.S. 723, Reh. Den. 323 U.S. 813; *Mason v. United States*, 250 F. 2d 704 (10th Cir. 1957); *Patton v. United States*, 281 U.S. 276, 312.

Other specifications of error include charges that government counsel was guilty of prejudicial misconduct in his opening statement to the jury, in the course of direct and cross-examination of witnesses and the closing argument. Appellant further contends that the trial judge made improper and prejudicial remarks during the course of the trial, made erroneous and prejudicial rulings in connection with the admission and rejection of evidence, gave erroneous instructions to the jury and failed to give necessary and proper instructions, the absence of which resulted in prejudice to appellant. Numerous examples of alleged misconduct on the part of government counsel have been cited by appellant. A review of the record requires a conclusion by this court that appellant was not the victim of such misconduct as to deprive him of a fair trial.

Many of the appellant's complaints are directed to statements of government counsel and the trial judge which took place outside the presence of the jury and which, had they been known to the jury, would have resulted in prejudice to the government's case, and probable advantage to appellant. In those situations where government counsel may have been guilty of improper examination or argument in the presence of the jury the trial judge carefully admonished the jury in such fashion as to eliminate the possibility of prejudice to appellant.

[fol. PP] Appellant contends that the trial judge made improper and prejudicial remarks which resulted in an unfair trial to appellant. Illustrations of such alleged prejudicial action fail to support the conclusion urged by appellant. The record in its entirety discloses consistent concern by the trial judge for preservation of the appellant's right to a fair trial before the jury. It should be mentioned that even if appellant's contentions were found possessed of some merit, his position at this time would be most tenuous. During the course of trial defense counsel made no objection to allegedly improper or prejudicial remarks of the trial court and allegations of such error were raised for the first time in this appeal. In general, failure to object to statements of the court and thus allow correction of error, if any, at the time precludes consideration of such remark for the first time on appeal.

Appellant charges the trial judge with the commission of error in the admission and rejection of evidence in such fashion as to result in prejudice to appellant. No persuasive examples of such rulings have been cited and we are of the opinion that rulings in regard to the admission and rejection of evidence were, if anything, more consistently favorable to the defense than to the government.

Appellant further alleges error in regard to certain instructions which are said to be prejudicial and misleading. The instructions in question, when considered in their entirety are fair and accurate. Failure of appellant to comply with Rule 30 of the Federal Rules of Criminal Procedure requiring objection to instructions before the jury retires to consider its verdict makes extended discussion of this point unnecessary. *Brown v. United States*, (9th Cir. 1955) 222 F.2d, 293 at 298.

Appellant's final criticism of the instructions given is directed to alleged failure by the court to give adequate instructions on the elements of criminal fraud. We are of the opinion that the instructions given in this regard were adequate and accurate. No objection to the instructions, as given, were made as required by Rule 30 and we find no reason, under these circumstances, to consider appellant's argument in further detail.

[fol. QQ] Appellant's attack upon the sufficiency of the evidence is not predicated upon the record. Testimony and documentary evidence introduced as part of the government's case was more than sufficient to sustain the verdict. We find no error in the order of the District Court denying appellant's motion for a new trial and supplemental motion for a new trial.

Affirmed.

[File endorsement omitted]

[fol. RR]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18284

MORTIMER SINGER, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—Filed and Entered January 6, 1964

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[fol. SS]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Barnes and Merrill, Circuit Judges, and Burke, District Judge.

MINUTE ENTRY OF ORDER DENYING PETITION FOR
REHEARING—February 10, 1964

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant filed February 3, 1964, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[fol. TT] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. UU]

VOLUME A

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Honorable Leon R. Yankwich, Judge Presiding.

No: 29518—Criminal

UNITED STATES OF AMERICA, Plaintiff,

vs.

STEPHEN FRANCIS SINGER and MORTIMER SINGER,
Defendants.

Reporter's Transcript of Proceedings

Los Angeles, California

Wednesday, April 19, 1961

APPEARANCES:

For the Plaintiff: Francis C. Whelan, United States Attorney: by Timothy Thornton, Assistant United States Attorney.

For the Defendants: Walter Campbell, Esq.

[fol. VV]

COLLOQUY BETWEEN COURT AND COUNSEL
RE: SETTING FOR TRIAL

Mr. Campbell: Your Honor, the defendants are willing both to waive jury and, as I stated, we are willing to save the court's time by stipulating to all of the correspondence which is material, in which event the case will be materially shortened.

The Court: The government, of course, does not have to waive. I have always questioned the constitutionality of that provision of the Supreme Court ruling saying that the

[fol. WW] government must consent to a waiver of jury trial. The government is not entitled to a jury trial. The defendant is granted a jury trial. I always questioned it but I do not want to be the first judge in the United States to raise the point.

Mr. Campbell: Well, your Honor has been the first in a number of points.

The Court: I know. However, I never urge them not to. Ever since I was on the Superior Court and took on cases like the Talbert, McKee, Fuller, and the Richfield cases, and the like, I have never hesitated to accept a waiver. Let us have the plea and let us continue it for setting. In the meantime, you get together, and if you want to waive, I will agree to take it, and you can set it down for trial.

.

[fol. XX] Mr. Campbell: Mr. Carr desires to be heard, your Honor, on a matter of setting.

The Court: All right.

Mr. Carr: If the court please, do I understand that you refuse to waive the jury?

Mr. Thornton: Yes.

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Honorable Leon B. Yankwich, Judge Presiding.

No. 29518—Criminal

UNITED STATES OF AMERICA, Plaintiff,

vs.

STEPHEN FRANCIS SINGER and MORTIMER SINGER,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California

Date: Tuesday, April 17, 1962

[fol. 2]

APPEARANCES:

For the Plaintiff: Francis C. Whelan, United States Attorney; by Timothy Thornton, Assistant United States Attorney.

For the Defendants: Walter Campbell, Esq., and Thomas T. Johnson, Esq.

[fol. 8]

OPENING STATEMENT ON BEHALF OF THE GOVERNMENT

Mr. Thornton: If it please the Court, Mr. Campbell, Mr. Johnson, ladies and gentlemen, as Judge Yankwich has explained, this is a mail fraud charge of 30 counts.

The first count sets forth the scheme which the government must prove to your satisfaction beyond a reasonable doubt.

In order to prove the commission of a criminal offense by the defendants Mortimer Singer and his son Stephen, Counts 1 through 17 allege mailings by Ralph E. Hastings. That was the name of the company which was carrying on this business. I am going to offer some exhibits. Ralph Hastings, that is the name. You will not see the name Singer throughout this case. You will see it on some documents, but generally it will be Ralph E. Hastings.

Counts 1 through 17 refer to mailings from the Ralph E. Hastings Company through the U. S. Mail, 30 counts in the indictment. That refers to 29 people, 29 different amateur song writers. Exhibits 31 and 32 refer to two different people but they are not named in the indictment, they are what we call similar acts.

The Court will explain that to you in due time.
[fol. 9] But at any rate Counts 1 through 17 refer to mailings going to amateur song writers.

Counts 18 through 30 refer to mailings coming in. Generally it is payments, money orders or a bank money order, Postal money order, or a check, which came through the mail this way to Ralph E. Hastings in Los Angeles.

[fol. 10] All of the witnesses are from out of state. There will be little question in this case that it was a business carried on through the mail. There will be various stipulations as to the mailing.

What was the program all about?

The people who will take the stand—incidentally, through stipulations, which are agreements between counsel, we are not going to argue about this fact and that fact; we won't call the total of 29, plus 2, 31 witnesses, amateur songwriters. We will only call 14 of those people. The others we will stipulate to the correspondence, the mailing of the correspondence, et cetera.

At any rate, the people who we will call will tell you that they had written a lyric, four lines or eight lines of poetry. In a magazine, or through some contact, generally they were contacted by one of two companies, Hollywood Tunesmiths or Music Makers, both Los Angeles businesses. Their proposition was that they would take their lyric and put a melody or music with it, so then you would have a short little song, and they would get a lead sheet back,

which is just the scale and words under it, and a melody. Very similar. Not like the sheet of music you buy in the store. It didn't have the three staves. Just the one staff, melody, and the words under it. Simple.

That's the frame of mind. These people now have [fol. 11] their four-line poetry or their eight lines set to a little, simple sheet. These companies were not operated by the defendants. Now we get the correspondence from Ralph E. Hastings. You are sitting at home, you get your lead sheet, and you get a letter on this masthead (indicating). Once this trial begins and you hear all the evidence—incidentally, as Judge Yankwich advised you, the evidence is not what I say, but what the witnesses say and the exhibits he allows to go into evidence. If the court allows it, then you consider it. But once you have considered all this, you can't go back to the original state you are in right now.

Consider yourself as an amateur songwriter with one lead sheet which has been prepared for you with a melody. This is the first two opening paragraphs I want to read to you:

"The Mad Hatters have informed me that they are willing to record your song with orchestra at a session now being scheduled and have requested that I contact you for the necessary permission. I am the Mad Hatter's personal manager."

The next paragraph:

"As I understand, the song which The Mad Hatters refer to is one of your compositions they learned of from a publisher's agent who is either handling your song, or has handled it in the past. The title of the composition is [fol. 12] TOMORROW IS MY WEDDING DAY."

And then the letter went on. There is no mention of any money in this. It just goes on, the Mad Hatters want to get your permission, and Ralph E. Hastings is writing to you to find out if you will go along with that. This is the key thing. The Mad Hatters want to record.

Next-to-the-last-paragraph: "For the recording session we will need two more copies of the song, an orchestra arrangement and a vocal arrangement for The Mad Hatters. I am enclosing recording and agent's agreements which must be signed before we can proceed."

And attached is an agreement in which they are going to get 10 per cent of the royalties, of all moneys you receive from motion pictures, television or radio sponsor use of said recording. Then your name, the amateur songwriter's name is on it, and the name of the song. That is signed by Ralph E. Hastings, when you receive it.

Also you get in that opening letter this little brochure of The Mad Hatters.

Who are The Mad Hatters? Perhaps you have never heard of them before. You want to know who are The Mad Hatters. You look at that and you see "Successful on Tour! The Mad Hatters Personal Manager: Ralph E. Hastings."

You see: "Motion Picture Credits," "Annie Get Your Gun," "Three Little Words," "With a Song in My Heart," [fol. 13] "Jane Russell," "Ella Logan—Terrific," "Marilyn Monroe," "Charles Coburn," "Recently: Desert Inn • Las Vegas • Havana," "Colgate Comedy Hour with Jimmy Durante."

Incidentally, this scheme is mid 1957 through early 1959. Most of the correspondence you will be dealing with is 1958, but it goes from mid '57 through early '59.

"Colgate Comedy Hour with Jimmy Durante," "Ford Theatre."

This is what you hear. You had a little song, and you had music put to it. Now you get an offer from The Mad Hatters, a very impressive leaflet. No mention of money, but they need an orchestration and vocal arrangement. The last paragraph will give you an indication of what is coming:

"If you do not have an orchestration and vocal arrangement of the song, or if you find any difficulty in obtaining them, advise me by air mail and I will attempt to make the arrangements here."

So you advise them you don't have that, because all you have is the one little sheet. That is not an orchestration and it is not a vocal arrangement.

The defendants receive your name, the information of what you had from the previous company. All right. So the next letter: "Your communication advises that you do

not have an orchestration nor vocal arrangement. It will, [fol. 14] of course, be necessary to have both . . . for the Mad Hatters . . ."

"The Director of Recordings"—not mentioned by name. Who is it?

"The Director of Recordings has been informed of your advice that no orchestration nor vocal arrangement is available."

You can get it for \$87.50.

The first letter, you don't have any mention of money except the statement that you get 90 per cent of everything.

Your initial investment is \$87.50.

Now, what didn't the amateur songwriter know? What are you people going to hear today?

First, this New Mad Hatters Trio did not sing any professional dates. They never appeared on television, they never appeared on radio as a group, as The New Mad Hatters Trio.

There was at the time you received this material a group that had been disbanded, a Mad Hatters male quartet.

Both of these gentlemen pictured here, Mr. Moody and Mr. Tippe were members of that original quartet. These credits do not apply to the Mad Hatters Trio. The top two figures are Mr. and Mrs. Tippe, husband and wife, both professional singers, and Mr. Moody, who is a professional [fol. 15] singer. But they never sang as a group publicly.

There is a man by the name of Sanford Dickinson who originally operated the Ralph E. Hastings Company with Mortimer Singer. In 1958, the summer of 1958, Mr. Dickinson became sick, confined to the Sawtelle Hospital. I believe the date is August 18, 1958, that he died. At that time Mr. Singer brought in Stephen Singer, his son, to help him run this company. The arrangements that these three people had with Mr. Dickinson, with the successors, were that they would sing a song dubbed to a tape. They never saw the orchestra. They would come into a studio and a tape was played and they had the lead sheet there, and then they sang the song for two dollars apiece for the three of them.

They would sing any song. They didn't request that they go out to Mr. Shipman and get Tomorrow Is My Wedding Day. They said, "We will sing any song you bring us."

Let me read again, now:

"The Mad Hatters have informed me that they are willing to record your song . . . and have requested that I contact you for the necessary permission."

This whole scheme will show what you were offered was the exploitation, commercial exploitation of your song. The Mad Hatters' agreement was that somebody out—in this case Louisiana—wants to have his song sung to a record [fol. 16] by a professional. Not that he wanted it exploited commercially, but just wants to have it for his friends, to have one record so that he can show his friends, "This is my song put on a record."

Is that significant?

We will show that for the union scale rate you can't record for two dollars a song, but you can for something that was a private negotiation, where it is not going to be used commercially.

Would you have bought, if you were the amateur songwriter, if you had known all of that information—

Mr. Campbell: Just a minute. I object to the argument.

The Court: That goes beyond an opening statement. You are now arguing your case. Just state what you are going to prove.

Mr. Thornton: After the \$87.50 for the arrangement, if you sent that in—let me say, first, if you didn't send it in, you were sent another letter which offered you, offered to you for \$44 to have the same thing with Ken Starr.

Who is Ken Starr? We don't know. The government will call witnesses from the American Federation of Musicians, from Allied Television, Motion Picture Artists, several other guild organizations of that nature. They never heard of him.

[fol. 17] Somebody is on the record, somebody sang it. We don't know who.

The Vincent Poli Orchestra was supposed to be the orchestra. We will have similar negative evidence. People who you would expect to know these people don't know them.

There was an orchestra that recorded it, but who were they?

If you didn't go for \$87.50 for the Mad Hatters, you were then offered \$44 and you would hear Ken Starr.

That is sort of the first plateau. Then the next step in the program was a form letter which advised you:

"As we both understand, you are not required or obligated to expend any further moneys for the development specified in the agreement which covers the recording by the Mad Hatters, and the availability of that recording to motion pictures, television, and radio.

"The song has been recorded by The Mad Hatters, and is in our opinion a very fine recording. If successfully placed in a picture, The Mad Hatters recording could assist the song in the road toward success."

Well, going back, we will show that The Mad Hatters were not appearing in pictures, this Mad Hatters trio was not appearing in pictures, and had no intention of appearing in pictures. They did not know it was being used commercially.

[fol. 18] This letter goes on to advise, and you get to what is coming:

"To put out the popular 45 rpm speed, using two songs on each side of the record, * * * we can have the masters, stampers and pressings completed, pressing an original 100 records at a cost to you of \$94.

"After the original 100 records are pressed, we plan to contact disc jockeys and record stores. We will then send the selected disc jockeys a recording and the music stores a notice that commercial records of the song are ready and available to be put on sale. The record manufacturer is then in a position to fill orders at the standard wholesale rate."

• They emphasize the royalties again, 90 per cent for you and 10 per cent for us.

"If you desire that this be done," let us know.

All right. If you send in your money, then you have got what you requested. The 100 records didn't necessarily go to you.

Were they sent out? The government does not know.

That doesn't say they weren't.

We just don't know if they were sent out.

If you requested four or six, you got six or four, whatever you requested.

Suppose you did not immediately accept that, then [fol. 19] you received a telegram about two weeks or a month later. I don't have one immediately available, but it started out with the name of your song, it said, "Active responsible publishing company interested in your song, but they must get the pressed records first." Then a re-iteration: Please send the \$94 for the hundred records. If you can't send that, send 50 and we will get under way immediately.

Who was the active, responsible publishing company that was interested in exploiting your record? The name was the Eagle Pass Music Publications. It was operated by Dallas Eugene Turner. He will be called as a witness.

It is the government's position that this was part and parcel of the Mortimer Singer operation and was not a separate, arm's-length negotiation with the publisher.

What proof do we rely on for that?

The evidence we have of that will be the Standard Song-writer's Contract.

In the Ralph Hastings letter there is no mention by name of who that publisher is, but the time sequence will check out the correspondence. Immediately you get the correspondence from Eagle Pass Music Publications signed by Dallas Turner and you get a contract, a Standard Song-writer's Contract with Dallas Turner's name on it, and then you sign it and return one copy and keep one. Then you get a form letter from Ralph E. Hastings which advises you: [fol. 20] Well, now that you are dealing with a publishing company, don't deal with us any more, because we are all done, we did everything we were supposed to do and you should contact him.

Once again that is on a form letter. This is, Now that you are dealing with somebody else, don't write to us.

"Inasmuch as your song, recorded by the Hastings Company, has been placed under publication contract, in which you have transferred certain rights to the publisher, the six months percentage recording contract executed by you and R. E. Hastings is automatically terminated.

"With our understanding and agreement, you were allowed to enter into" this new contract.

"In view of the fact that the song is now under publication contract, all further negotiations and correspondence should be handled directly between you and your publisher."

The question is, was there somebody you could talk to or write to? Will Eagle Pass accept your letters?

This is evidence you will consider.

I think it was in February 1959 from Dallas, Texas, post cards were mailed out.

Remember this contract with Eagle Pass was signed by Dallas Turner in Los Angeles, California. February 1959 everybody received a post card postmarked Dallas, Texas. [fol. 21] No signature, but the stamp on it as the name who sent it out was Emil Julius Henke.

"Important Announcement:

"We are now under new ownership and management. We are also affiliated with Movieland Music Company, Tex-San Publications, All Glow Music and Warrior Records.

"Our new address is: Eagle Pass Music Publications, San Antonio, Texas.

"All correspondence should be directed to this office and Eagle Pass Music Publications will continue to publish the finest native American music.

"Cordially, Eagle Pass Music Publications by Emil Julius Henke, Manager."

What happened to Dallas Turner?

That is February.

In May, those witnesses who retained their correspondence will produce on pink stationery a letter from George Apple, President, Denver, Duke & Jeffrey Null, Inc., which says: We picked up all the rights of Eagle Pass, and you deal with us now, and we will let you know. Don't bother us.

That type of literature.

[fol. 22] That's in May of 1959. That is postmarked an Illinois corporation in Chicago.

So in a short period of time you go from Los Angeles to San Antonio to Chicago. You originally started with Ralph E. Hastings. Who do you write to to find out just what has happened? Why do we say Mr. Singer? Mr. Singer is of the Eagle Pass Publications. We will bring in the original plates that were printed which Mr. Singer ordered and paid for for the Eagle Pass Publications.

Incidentally on our order of proof will be the fourteen amateur songwriters. That will be with the Court's approval: If the Court allows it we will call them out of order.

Generally you will hear all the amateur songwriters case first, and the rest of the case, secretaries who answered the mail, who received the mail, printers who printed up the literature, bank accounts, and that kind of thing, and the Mad-hatters.

The last witness will be James Carlyle Berg. Mr. Berg was engaged in dealing with amateur songwriters with Mr. Singer for the period of mid '55 through 1957. The business transactions engaged in by Mr. Berg and Mr. Singer are not part of the indictment. The question before the jury is fraudulent intent. The Court allows this, it does allow it, just on this issue. Once you have found the scheme then you may look to Mr. Berg's testimony just as to Mortimer Singer's to determine whether this you think was fraudulent intent.

[fol. 23] At any rate Mr. Berg and Mr. Singer are engaged in the operation of some three companies from '55 to '57. The first one was the Winston Royal Publishing Company. That also dealt with amateur songwriters. They offer publications and saleable sheet music and artists' copies of your lyric for \$75. The government will present evidence of misrepresentations that went back and forth with that correspondence.

The second company was Melody Masters. The initial contact made with the amateur songwriter was by postcard advising him he could have a free melody arrangement and get a \$250 cash prize if his melody was of sufficient quality. After he sent in that then he was sent back and he was offered the same literature and once again we will show the misrepresentations by that company. It was an offer of \$32

of an amateur songwriter and commercial printing of 200 lead sheets, and distribution of the copies nationally.

If you didn't go for the \$32 offer then there was a \$24 offer plus ten percent of the royalties to Mortimer Singer.

Then the third company was the Thomas and Berg Company, Royal Melody Masters, and then Thomas and Berg. Thomas and Berg offered to make a master record of the amateur songwriter's song, which would contain two versions of the song; and one side a trio and vocalist, on the other side an orchestra and a vocalist. The initial price was \$72. If they didn't take that first offer that was dropped to [fol. 24] \$36 and 10 percent of the royalties. If you didn't accept that it was \$22 and 15 percent of the royalties to go to Singer.

Mr. Berg will go into the literature involved with those companies. Those companies sent out solicitations.

So, ladies and gentlemen, that's about it. There will be very little question about the mailing in this case. As I see it there are two ultimate questions which you are concerned with. First, was this a fraudulent scheme, and secondly would the defendants be responsible.

Incidentally, when a mailing goes out, the defendant doesn't have to personally sign it. If he is instrumental in causing that mailing to go out, that is sufficient. These will be facsimile signatures. I think if you direct attention to those things the evidence will fall in order and make sense.

First, was it a fraudulent scheme, and secondly, are these two men in charge responsible.

[fol. 47]

COLLOQUY BETWEEN COURT AND COUNSEL

(Whereupon, the following discussion took place in chambers between Court and counsel. The defendants were present, the clerk present and the reporter present.)

The Court: There are certain cases, gentlemen, which are standard because they lay down a fundamental principle. They are awfully hard to come by. If you ever wrote as much as I have you will find how difficult it is to find one that states general principles, especially in these later

years when judges do not do their own thinking, when the judges have law clerks just out of law school write their opinions. In the old days before they had law clerks who wrote opinions for the Appellate-judges, the judges rationalized their thinking.

One of the leading cases on fraud, in fact it was a mining fraud, was Southern Development Company versus Silva. I had the Silva right, I didn't have the plaintiff right. If I [fol. 48] looked at this book of my own composition I would have found it, but I didn't. It is Southern Development versus Silva, 125 U. S. 247. It is a suit in equity to set aside a contract relating to a mining property. It was written by Mr. Justice Lamar. You remember probably he had a very distinguished career, one of the few confederate soldiers who ever became a Justice of the Supreme Court.

While this was a civil case the principle is the same. I want to read the statements of what is necessary to establish fraud.

"In order to establish a charge of this character, the complainant must show by clear and decisive proof—

First. That the defendant has made a representation in regard to a material fact;

Secondly. That such representation is false;

Thirdly. That such representation was not actually believed by the defendant, on reasonable grounds to be true;

Fourthly. That it was made with intent that it should be acted on;

Fifthly. That it was acted on by complainant to his damage;

And Sixthly. That in so acting on it the complaint was [fol. 49] ignorant of its falsity, and reasonably believed it to be true."

Some of these elements like damages are not material in fraud, but belief and truth of a statement are elements of proof, for if the man does not believe the statement to be true then there is no fraud. I still believe, however, that

the question shouldn't be asked in that form. Then it continues:

"The first of the foregoing requisites excludes such statements as consist merely in an expression of opinion or judgment, honestly entertained; and, again, (excepting in peculiar cases) it excludes statements by the owner and vendor of property in respect to its value."

Now we have a California case which is a leading case, *Oppenheimer versus Clunie*, 142 Cal. 313 at page 318. The Court adopted the definition from *Southern Development Company versus Silva*, and then made this additional statement:

"The Court said in *Colton versus Stanford*, 82 Cal. 399:
A. A misrepresentation as the basis of rescission must be material; but it can be material only when it is of such a character that if it had not been made the contract would not have been entered into. The misrepresentation, it is true, need not be the sole cause of the contract, but it must be of such nature, weight, and force that the Court can say [fol. 50] "Without it the contract would not have been made."'"

That is the essence of fraud.

And while damage is not necessary in a criminal fraud the other elements are still necessary. So I think that these questions that are propounded with the modifications suggested are proper questions.

Mr. Campbell: May I just speak a moment?

The Court: Yes.

Mr. Campbell: I do not think there is any essential difference between your Honor's thinking and what I'm thinking. I apparently am not expressing myself well. I do not think that there is any question but that reliance so far as civil fraud is concerned, that possibly criminal fraud is an element, that the person believed the statement that was made to him.

The Court: Yes.

Mr. Campbell: But I do not believe, and I mean it is my contention, that the person to whom the statement is made in a criminal case where it doesn't matter actually in a

criminal case whether the victim so-called relied or not, I mean he doesn't have to ever have invested any money, for if it was a scheme calculated to defraud the offense has been committed with the mailing. We are in agreement on that, I think, whether he ever put in a dime or not, whether the victim relied upon it.

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[fol. 227] MARGARETTE FRANCIS HARDCASTLE, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?

The Witness: Margarette Francis Hardcastle.

The Clerk: M-a-r-g-a-r-e-t-t-e?

The Witness: Yes.

Direct examination.

By Mr. Thornton:

Q. What is your occupation, Mrs. Hardcastle?

A. Housewife.

Q. Where is your home?

A. Bowling Green, Kentucky.

Q. Did you ever have any business dealings with Ralph E. Hastings Company?

A. Yes, I did.

Q. Do you know approximately what year?

A. Yes, I do. It began in January of 1958.

Q. What was the nature of your business with them?

[fol. 228] A. Well, I had—Music Makers had put the music to a song; I had written the lyrics and they had put the music to it, so he contacted me by letter that the Madhatters wanted to record my song.

Q. Did you have your song recorded by Ralph E. Hastings Company?

A. Yes, I did.

Q. Who were the artists or the vocal group on it?

A. The Madhatters.

Mr. Thornton: May I have this marked next in order, your Honor?

The Court: All right.

The Clerk: 37, Plaintiff's Exhibit for identification.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 37 for identification.)

Mr. Thornton: I present it to counsel for examination.

Q. Mrs. Hardcastle, I want to show you Plaintiff's Exhibit 37 for identification and ask you to tell me what that is.

A. That is the song that I wrote the lyrics to, and Music Makers put the music to it.

Q. The Music Makers of what city?

A. Los Angeles. Hollywood, rather.

[fol. 229] Q. How did you receive this? By mail?

A. By mail, yes.

Q. I now want to show you the contents of Plaintiff's Exhibit 13. I show you first the letters which are enclosed in envelopes with the stamp "Ralph E. Hastings"; can you identify that material?

A. Yes, I can. They are all mine from Ralph E. Hastings.

This is the first one that he wrote me, (Indicating), which is when I lived in Huntsville, Alabama, and I didn't receive it until I moved to Bowling Green.

Q. And the rest where did you receive?

A. All these I received from Los Angeles, from Ralph E. Hastings, in Bowling Green.

Q. When you were living in Bowling Green?

A. That's right.

Q. I show you a telegram; can you identify that?

A. Yes, I can. The telegram was sent to me in May, but I don't remember the exact date. In 1959, I do believe.

Q. Here is a date up here (indicating). Can you read that?

A. Yes, I can. Do you want me to read it?

Q. Just the date.

A. June 13, 9:00 a. m. Is that right?

Q. And the year?

A. '58.

[fol. 230] Q. I show you an envelope here which is unopened. Do you recognize that?

A. Yes, I do. This is a letter that I had written to Mr. Hastings after he had sent me four records, and that was all I ever received. And so I wrote to him asking him what had happened. And so the letter—

Mr. Campbell: I am going to object to the contents of the letter.

The Court: I beg your pardon?

Mr. Campbell: I object to the contents of the letter, it's an unopened letter.

Mr. Thornton: We are not offering the contents of the letter.

Mr. Campbell: But the witness is describing the contents.

The Court: Strike that out. The letter not having been received the contents are immaterial.

By Mr. Thornton:

Q. Approximately when did you send that letter?

A. March of '59.

Q. Now I want to show you two checks. Can you identify those checks cancelled?

A. Yes, I can. They're checks that my husband wrote out to Ralph E. Hastings for me.

Q. Would you tell us the amounts on the check and the date on each check?

[fol. 231] A. The first check was February the 21st, 1958 for the amount of \$87.50. The second check was November 17th, 1958 for \$47.00.

Mr. Campbell: We will stipulate that they were received and negotiated.

Mr. Thornton: So stipulated.

Your Honor, I move to introduce into evidence Plaintiff's Exhibit 37, the sheet of music, and the contents of Plaintiff's Exhibit 13 that the witness has identified.

Mr. Campbell: As to the contents of what you refer to as Exhibit 13 I have no objection, and will stipulate that anything bearing the imprint or signature of Ralph Hastings can be admitted into evidence.

The Court: He has been in the habit of removing everything else.

Mr. Campbell: I assume he has removed everything else.

The Court: You will remove the unopened letter.

Mr. Thornton: I want to put the letter in sealed. I want to put the letter in for the postmark and the day it was sent.

Mr. Campbell: I object to that.

Mr. Thornton: Not the contents.

Mr. Campbell: I object to that, it's immaterial.

The Court: She testified to the date on which she wrote it. [fol. 232] Mr. Thornton: All right, I will remove that.

May it be received?

The Court: It may be received.

The Clerk: 13 and 37 in evidence.

(The documents referred to were marked as Plaintiff's Exhibits Nos. 13 and 37 for identification and were received in evidence.)

By Mr. Thornton:

Q. Referring to this first letter, I'll remove the contents, it is a letter dated January 23rd, 1958, and one copy of an agreement dated January 23rd, 1958, the title of the song "Wheelchair Blues", and also a leaflet relating to the Madhatters Trio. How many copies of the agreement did you receive, Mrs. Hardcastle?

A. Just the two. I sent one back and kept one.

Q. What was your understanding that you were to do as part of the agreement, and Mr. Hastings would do as part of the agreement.

A. Well, the way I—

Mr. Campbell: Just a minute. That is objected to. The agreement speaks for itself, if the Court please.

Mr. Thornton: It does if the meaning—

Mr. Campbell: It is not a question of reliance, it's a question of what the contract or agreement calls for.

Mr. Thornton: Would you like to examine it, your Honor?

We say on ambiguous agreements and the witness should [fol. 233] say how she understood the ambiguity.

Mr. Campbell: It's the same agreement which is used in each case.

The Court: There is no ambiguity in this agreement requiring interpretation.

Mr. Thornton: May I be heard later, your Honor, on paragraph 2?

The Court: I beg your pardon?

Mr. Thornton: There is one point that I would like to be heard on.

"An additional recording to be made available for motion picture musicals". This second paragraph, the last portion, what she understood by "being available to motion pictures."

The Court: No, it is ordinary English language "made available", which is to offer them for buying just as a newsboy makes available to you a paper on the street, you may or may not buy.

By Mr. Thornton:

Q. Referring to the leaflet which I hold in my hand, what was your understanding as to the information on that leaflet?

Mr. Campbell: May I see what document?

The Court: The Madhatter thing?

Mr. Thornton: Yes, sir.

The Court: All right.

[fol. 234] Mr. Campbell: I'm going to make the objection again, if the Court please, that it is immaterial.

The Court: I'm glad you're making the objection because we shouldn't be carrying a pig in a poke, you know, a general objection that was made yesterday that may not be valid five days from now. The objection is overruled.

By Mr. Thornton:

Q. You may answer.

A. My understanding was that the Madhatters would record my song and use it in personal appearances and in a night club act, and maybe in motion pictures. That was my understanding that I thought these people would do it, the original Madhatters. That was my understanding.

Q. Did you personally ever know of the Madhatters Quartet?

A. No, I never knew them personally, but I had heard of the Madhatters.

The Court: Did it make any difference to you whether it was a trio or a quartet?

The Witness: Pardon?

The Court: Did it make any difference to you whether it was a trio or quartet?

The Witness: No, it didn't really. I just thought that it was something honest that I believed in.

The Court: Well, you heard the man testify that there was such a thing as the Madhatters, and that these three [fol. 235] people composed it at one time.

Mr. Thornton: The witness has been excluded from the courtroom, your Honor.

The Court: I forgot. I beg your pardon. All right.

By Mr. Thornton:

Q. Did you rely on the accuracy of the information on that in-making your decision?

A. Yes, I did.

Q. Would you read the two paragraphs of the opening letter "Madhatters have informed me" to yourself?

(The witness read the letter as requested.)

Q. What was your understanding as to those two paragraphs?

A. Well, it was my understanding that Mr. Ralph E. Hastings was the Madhatters' personal manager, and that he had found the song through the Music Makers, and had requested them to contact me.

Q. How many records, songs, did you send to Ralph E. Hastings?

A. Only the one.

Q. Incidentally, on that letter it inquires "If you do not have an orchestration and vocal arrangement of the song, or if you find any difficulty in obtaining them, advise me by air mail."

Did you have an orchestration and vocal arrangement of your song?

[fol. 236] A. No, I did not.

Q. Did you communicate with Mr. Hastings?

A. Yes, I did.

Q. I now show you a letter dated February 5th, 1958, and it is addressed to you and says:

"Your communication advises you do not have an orchestration."

Was that the answer to your letter?

A. Yes, that was the answer, uh-huh.

Q. This letter makes reference that the scale rate for both the orchestration and vocalization is \$87.50. Did you send that to them?

A. Yes, I did.

Q. That's the check that you have identified?

A. Yes.

Q. And did you receive an acknowledgment of receipt of your money?

A. Yes, I did. This is it.

Q. That was dated February 26th.

I show you the contents of a letter postmarked March 18th, 1959. I will stay in chronological order here. I will skip that for a moment.

I go to the next letter which you have in chronological order dated May 13th, 1958, in which Mr. Hastings advises you he had put out 45 rpm's 100 records for \$94.00. Did you [fol. 237] agree to that?

A. No, I didn't. I did not write them because I didn't have the money.

Q. Did you subsequently receive a telegram?

A. After I received the telegram.

Q. The telegram contains:

"Publisher will issue royalty publication contract direct to you, and I guarantee him records are being manufactured."

Did you receive a royalty publication contract?

A. No, I did not.

Q. Did you send any money in response to that telegram?

A. Yes, I did, after another letter. They asked for \$94.00, and I didn't have it. Then so later on they wrote me a letter and told me I could cut it, so I sent them \$47.00 for 50 records, supposed to be.

Q. Do we have that letter here?

A. It should be there, I don't know.

Q. I now show you a letter dated October 23rd, 1958. Is that the letter to which you refer?

A. Yes, this is it.

Q. Would you read the last paragraph out loud, please, that letter?

A. This—

Q. No, excuse me, the next to the last.

[fol. 238] A. You want me to read it out?

Q. Please.

A. "In order to proceed on this reduced price of \$47.00, being the cost to you for the manufacture of the records, the exploitation to disc jockeys, and listing with music dealers, we'll need a prompt reply in the enclosed air mail envelope, the reason being that we plan to distribute the next series of Film-Tone records to the disc jockeys and list three records with record dealers with the distributors before the usual retail business boom of the Christmas Holidays."

[fol. 239] Q. Did you ever receive a list of the disc jockeys to whom the records were distributed?

A. No, I did not.

Q. Did you send \$47 in response to that?

A. Yes, I did.

Q. Did you get a letter acknowledging receipt of the \$47?

A. Yes, I did. This is it.

Q. That was dated—?

A. November 21, 1958.

Q. I show you a letter dated, postmarked January 8, 1959, and I will read it.

"Our contract with you covering the recording of your song material was for a period of six months duration. The contract is now over six months old and, therefore, we have no further right to a percentage interest in same. This letter will confirm the above facts and all rights, title and interest

in the recording heretofore held by this firm is automatically assigned to you."

Had you received any royalties pursuant to the agreement you signed with these men up to that time?

A. No, I had not.

Q. Did you ever?

A. No, I did not.

[fol. 240] Q. I show you the contents of a letter postmarked March 18, 1959. Do you recall receiving that?

A. Yes, I do.

Q. What did you understand from that?

A. I understood that my record would be out, published, but I couldn't understand why my name was under it instead of the Madhatters.

Q. Did you receive any correspondence from Eagle Pass Music Publications?

A. No, I did not.

Mr. Thornton: I have no further questions, your Honor.

[fol. 251] DALLAS EUGENE TURNER called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Thornton:

[fol. 266] Mr. Thornton: I want to show that Mortimer Singer was interested in this company.

The Witness: He was never interested in this company.

Mr. Thornton (Continuing): And also that this material went through the mails.

May I offer this stipulation with counsel. The exhibits which I will identify by name, that the witness would testify similarly as to Eagle Pass Music Publications, bearing the facsimile of his signature? Subject to your objection as to materiality and relevancy.

Mr. Campbell: The witness, in response to your question—rather, the colloquy, as to the interest of Mortimer Singer;

just stated that Mortimer Singer was never interested in this company.

The Court: The jury is instructed to disregard the statement that Mortimer Singer had an interest, because this witness hasn't so testified. Nor has any other witness testified, as yet, that Mortimer Singer, or the other defendant, had anything to do with Eagle Pass. Except there was some inference that songs were sent, that people may have been referred to this company for publication.

[fol. 278] Q. To whom did you send them, do you know?

A. I don't actually recall, because Mr. Henke, you see, he was in charge of that, and recordings were sent to Mr. Henke because he had a recording company as well as an interest in Eagle Pass Music Publications, and therefore his contacts were the ones that were going to receive them. I didn't have time to handle that particular phase of the promotion, sir.

[fol. 282] By Mr. Thornton:

Q. During either 1958 or 1959 did you meet Mr. Singer in his hotel room in Texas?

A. I met Mr. Singer in Fort Worth, Texas in December of 1958, yes.

Q. Was that in the hotel room?

A. Yes, that's a common place for people to meet when they are traveling.

Q. Who else was present?

Mr. Campbell: Objected to as immaterial.

The Court: I'll sustain the objection. I can't see the materiality. The man has a right to associate with somebody else.

Q. Did you have any financial transactions, was there any money passed between you and Mr. Singer at that time?

Mr. Campbell: I'll object to that as immaterial.

[fol. 283] The Court: I'll allow the question to be asked. Go ahead, you may answer.

The Witness: I am subpoenaed here in the case of Eagle Pass Music Publications, and there was no money ever turned over to Eagle Pass Music Publications in no hotel room or any other time.

By Mr. Thornton:

Q. Did you have any financial transaction, any money passed between you and Mr. Singer in a hotel room in Fort Worth, Texas?

Mr. Campbell: I'll object as immaterial.

The Court: I'll sustain the objection. The man has a right to have a transaction in a hotel room.

[fol. 286] By Mr. Thornton:

Q. And to whom did you sell?

A. To Mr. Henke and Mr. Hufstedler, and Mr. Henke handled the transaction. I signed the bill of sale to the two of them.

Q. Do you recognize the other signatures other than your own there?

A. Yes. That's Mr. Hufstedler's signature, and also Mr. Henke's signature, sir.

Q. Do you recall—and think carefully—if you don't recall, say you don't recall. Do you recall whether or not the three of you signed at the same time?

A. No.

Mr. Campbell: Objected to as immaterial, if the Court please.

The Court: I'll allow the question to be asked, although I will say that there is no rule requiring an instrument to be signed at the same time by all parties to it. Go ahead, [fol. 287] you may answer, however.

The Witness: No, we were not all present, sir. I of course signed, Mr. Hufstedler signed this at the same time, and then it was sent to Mr. Henke for his signature.

By Mr. Thornton:

Q. Did you observe Mr. Hufstedler sign it?

A. Yes, he definitely signed it.

Q. In your presence?

A. In my presence.

STATEMENT BY THE COURT

The Court: * * *

(Addressing the jury) Ladies and gentlemen, I want to issue a warning to you. When a witness is asked a question and he answers in the negative, you are not to infer, you see, that the intimation of the question is true. Where a witness answers no, then even though he is brought in by the [fol. 288] party and proves to be an adverse witness, as this witness proved to be, the only way he can prove that the contrary of what the witness testified is by offering testimony to contradict it. Until he does that the statement there remains in the record upon which you can make a finding, you can reach a conclusion as to a particular fact. In other words, inexperienced jurors sometimes overlook the fact that a clever lawyer for the government or for the defendant asks a lot of questions which he knows will be answered in the negative in the hope that he will carry the impression that the truth is not as a witness gave it, but as he intimated in the question which the witness who did not answer.

So I want to give you a warning, because this is a very dangerous type of examination. I have a right to inform you. He has a right to do it. He has a right to do it, but I warn you to pay no attention to any thought that the witness was not telling the truth, unless you believe from his testimony that he isn't telling the truth. But even if you believe he isn't telling the truth, you can't find the contrary to what he said until evidence is produced from other sources to the truth of the matter.

[fol. 473] MAX HERMAN, a witness called by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?

The Witness: Max Herman.

The Clerk: All right, Max Herman.

Count?

Mr. Thornton: No count.

Direct examination.

By Mr. Thornton:

Q. Mr. Herman, what is your occupation?

A. I am the Vice-president of the Musicians Union of Los Angeles.

Q. And how long have you had that position?

A. I have been an officer for six years, Vice-president for four.

Q. Would you tell us briefly your musical background?

A. I came to California as a trumpet player with Bob Crosby. I worked for 12 years at CBS prior to my election as Vice-president.

Q. Have you done any arranging?

A. A little.

Q. Do you maintain a list of the legal names and the professional names of members of your union?

A. We do.

[fol. 474] Q. And would you tell us briefly what the membership of your union encompasses?

A. Our membership consists of 15,000 members, instrumentalists, copyists, arrangers, composers.

Q. Have you examined your records in connection with the name Ken Starr, S-t-a-r-r, for the years 1957, 1958 and 1959?

A. I have examined the records. There is no—

Mr. Campbell: Just a minute. That's objected to. This is negative testimony. Ken Starr is a singer. This is the Musicians Union of instrumentalists, people of that kind, negative testimony of this kind.

The Court: Do you include vocalists?

The Witness: We only include vocalists if they play instruments.

By Mr. Thornton:

Q. Is it common to some members or some musicians who are both vocalists and instrumentalists to register with different unions, more than one union?

A. Yes.

Q. Referring to my earlier question you have examined the records for 1957, '58 and '59?

A. I have.

Q. And is Ken Starr a member or has he been a member during that period of time in your union?

Mr. Campbell: Objected to as immaterial.
[fol. 475] The Court: I have to sustain the objection. There is no evidence that he played an instrument, and that's a condition. Mr. Dallas Turner testified that he played a guitar. But there is no evidence that Ken Starr played an instrument, and therefore he couldn't qualify for the union. So his absence in the union would be no more significant than the absence of your name or my name.

By Mr. Thornton:

Q. Now direct your attention to the name Vincent Poli. First of all are orchestra leaders members of your union?

A. All orchestra leaders are members of our union.

Q. And have you searched your records for 1957, '58 and '59 with reference to the name Vincent Poli, P-o-l-i?

A. I have, and I have not found the name Vincent Poli.

Q. Will you tell us your practice insofar as a man may use a professional name other than his legal name?

A. When a man has a professional name we use both his legal and professional name.

The Court: It is possible that a man may have an orchestra and not be interested sufficiently in a union to affiliate, isn't it?

The Witness: All professional people that work in clubs or recordings, television, radio, are all members of the union.

Non-professionals, yes, from the school boards, young people coming up, are not union people. They become union [fol. 476] people before they work professionally, usually.

The Court: I see, all right.

By Mr. Thornton:

Q. Does your union have membership including musical arrangers?

A. We do.

Q. Have you caused a search of your records for the years 1957, '58 and '59 for the name Al Terry as an arranger?

A. There is no Al Terry listed as an arranger.

Q. Is there an Al Terry listed for anything else?

A. We have an Al Terry listed as an instrumentalist.

Q. Mr. Herman, in addition to your position with the American Federation of Musicians, do you have any publishing company?

A. I do.

Q. And how long have you been in that business?

A. I've been in the publishing business since 1951.

Q. And what does the word "publishing" mean to you?

Mr. Campbell: Objected to as immaterial what it means to him.

Mr. Thornton: This man who has divided his time to this career, I think the jury is entitled to know what it means to a professional.

The Court: That isn't the question what it meant to him. What did it mean to the lay person to whom these representations were made, what were they told. You are [fol. 477] not going to substitute expert knowledge of a man to the lack of knowledge of a truck driver or a farmer to whom representations were made by holding them to a representation of the type that would be understood by Mr. Herman. The objection is sustained.

The jury are instructed to disregard questions and not to imply what the answer might be if it had been given. As I warned you before there is always a danger. Someone once said "You cannot unring a bell", and that is true. Sometimes these linger, and I want to warn you that where I

sustain objections to questions you are not to imply what the answer would have been if I had allowed it. It is my responsibility to see that improper questions are not asked, and if they are asked they are not answered. I cannot anticipate that they are going to be asked because I do not know what's in the mind of a prosecutor until he asks the question. Of course he has a right to make certain inquiry, but that's what makes lawsuits. The difference between him and me is he is a prosecutor and I'm a judge. I have to weigh the balance nice clear and true both between the government and the defendant, while he is only interested in winning a lawsuit, you see, just as all lawyers if they are good advocates are interested in winning lawsuits. Of course they want to win them by honorable means, otherwise they get in trouble.

You are not to draw any inference of what the answer would be.

[fol. 527]

COLLOQUY

Mr. Thornton: Your Honor, at the close of the session this afternoon may we reserve some time to argue out whether or not we will be allowed to call James Carlyle Berg as a witness this afternoon, may we argue the issue whether we will be allowed to call James Carlyle Berg?

The Court: If you tell me now, if you tell me what you want to offer. Let me say this. In all cases involving intent, similar acts may be shown as going to intent, but they must be related in point of time to the time we are talking about. And I have the law right here in front of me, the Ninth Circuit and other circuits. It must be clearly related.

Mr. Berg will not be allowed to testify that he was indicted and pleaded guilty. If you want to show that Mr. Berg knew of similar—he was a victim—I cannot see how you would bring him in.

[fol. 534] Mr. Thornton: In view of your ruling, your Honor, would you instruct the jury or explain to the jury

some things counsel said in his opening statement you have ruled against?

I made a statement in opening to the jury that I would call Berg. I request that the court give an instruction to the jury that not all things that counsel said in his opening statement was he allowed to do because the court ruled it was immaterial.

[fol. 561] EMIL JULIUS HENKE called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

[fol. 562] Direct examination.

By Mr. Thornton:

Q. Mr. Henke, were you ever associated with the Eagle Pass Music Publications?

A. Yes, sir.

Q. Would you tell me the number of that exhibit in front of you that is on the small white sheet?

A. 39.

Q. Would you refer to the signatures at the bottom of that?

A. Yes, sir.

Q. Can you identify any of those?

A. I can identify Mr. Turner's and mine.

Q. Where were you when you signed yours?

Mr. Campbell: Just a minute. May I see that exhibit?

[fol. 563] The Court: It is the agreement to transfer, isn't it?

The Witness: Yes.

The Clerk: It is in evidence.

Mr. Campbell: No, sir, it is not in evidence. That is why I wanted to examine it.

The Court: All right.

Mr. Campbell: May I have the question?

(The question was read by the reporter.)

The Court: Overruled.

Mr. Thornton: You may answer, Mr. Henke.

The Witness: San Antonio, Texas.

[fol. 566] Q. Did you invest any money in Eagle Pass Music Publications?

Mr. Campbell: Objected to as immaterial.

The Court: It is immaterial, unless you intend to trace it to the Singers.

[fol. 567] Mr. Thornton: Excuse me, your Honor!

The Court: Unless you intend to trace it to the Singers it is not material.

Mr. Thornton: I expect a negative answer.

Mr. Campbell: I object to counsel indicating the answer, in the face of an objection.

The Court: I have warned the jury to disregard it. Counsel doesn't know the rules of evidence.

I think between now and the next case he ought to do a little homework and learn the rules of evidence in criminal cases.

I am sincere, and I think it is my duty to warn the jury, because you are doing a lot of things that shouldn't be done by a prosecutor. You make statements of what you intend to prove when I have sustained the objection, which is wrong.

[fol. 681] REXFORD WOOLARD HUFSTEDLER a witness called by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Thornton:

Q. Mr. Hufstedler, did you ever hear of the Eagle Pass Music Publications Company?

A. Yes, sir, I have.

Q. Who was the operator of that company?

A. Dallas Turner.

Q. Were you ever a partner of Dallas Turner in the operation [fol. 682] of that company?

A. Absolutely not.

Q. I want to show you Exhibit 39 marked for identification. Is that your signature at the bottom of that sheet?

A. I didn't sign this document. This could be my signature or a copy of my signature.

Q. But you didn't sign it?

A. No, sir.

[fol. 702]

STATEMENT BY THE COURT

The Court: . . .

(Addressing the jury:) Ladies and gentlemen, we are about to take a recess until 2:00 o'clock. The Court admonishes you not to converse among yourselves or anyone else on any subject connected with the trial or to form or express an opinion thereon until the cause is finally submitted to you.

Once more I call your attention to the fact that a good bit of defensive matter is coming in through the witnesses produced by the government, and that is evidence in the case which you have a right to consider.

You will note that many of the witnesses say that these transactions were entirely different from what the government claims they have been. Ultimately you will have to determine, when the time comes for your verdict, which version you will accept, the version that the government places upon the transaction or the version of some of these witnesses place on the transaction. Or if a witness testifies both ways, which of the two you are going to accept.

So I warn you it is very important in this case to keep your mind open until the evidence is concluded.

The defendant incidentally doesn't have to offer any evidence at all. If the defendant wants to present the case on the basis of the facts brought out on cross examination he has a right to do so.

[fol. 703] So long as I am making that statement I want to also state that ultimately you have got to judge the case not by what counsel for the government or counsel for the defendants have said they would prove, but what they actually were allowed to prove. You will remember that I told you that the opening statements are merely outlines of what they think they will prove. Many a time the things they say they will prove they are not allowed to prove. So that the case must be judged not by what the lawyers say, but by what the witnesses under oath said in open court.

Matters which were not testified to cannot be evaluated by you merely because the lawyer for the government and the lawyer for the defendants expected to prove it. Perhaps he wasn't allowed to prove it by the Court or perhaps on second thought he decided not to do it.

So in a case of this character that extends over a long period of time jurors forget these things. That is why I keep reminding jurors in cases of this character that what they are to determine is the truth of the charges in the indictment, and they are to do it on the basis of the proof offered in the record, not on the basis of the opening statement of either side or of arguments of counsel.

All right.

[fol. 830] MORTIMER SINGER the defendant herein, having been first duly sworn, was examined and testified as follows:

[fol. 884] Cross Examination.

By Mr. Thornton:

Q. Do you recall that that oil well—oil rights was purchased for a hundred dollars?

Mr. Campbell: Just a minute. I object to the question in that form. Purchased by whom, when, and under what circumstances?

Mr. Thornton: I will reframe the question.

Mr. Campbell: If the court please, we are going very far afield in this type of cross examination.

The Court: This is not proper cross examination. This wasn't gone into.

Supposing he bought something for a hundred dollars instead of for some \$5,000, he wouldn't be the first American who struck it rich.

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[fol. 941] THE COURT'S CHARGE TO THE JURY

The Court: The law of the United States permits a judge to comment on the facts in the case. Such comments are, however, mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in the case. However, it is not my custom to exercise this right, nor shall I exercise it at the present time. I shall leave the determination of the facts in the case to you, satisfied as I am that you are fully capable of determining them without any aid. However, it is my duty under the law, and my exclusive province, to instruct you as to the law that is applicable to the case in order that you may render a general verdict upon the facts in the case as determined by you and the law as given you by me in these instructions. It would be a violation of your duty to attempt to determine the law or to base a verdict upon any other view of the law than that given you by the Court, a wrong for which the parties would have no remedy, because it is conclusively presumed by the Court and all higher tribunals that you have acted in accordance [fol. 942] with these instructions as you have been sworn to do.

During the course of the trial I have at various times asked questions of certain witnesses, including the defendants. My object in so doing was to bring out in greater detail certain facts not yet fully testified to by the particular witness. You are not to infer from the questions I asked that I have any opinion as to the facts to which the questions related. If from those questions you have made the inference that I have an opinion as to the particular facts to which the questions related, it is your right to treat it as an opinion which you are at liberty to disregard in ar-

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 riving at your own conclusions as to particular facts or as to any other facts in the case.

You are here for the purpose of trying the issues of fact that are presented by the allegations in the indictment and the plea of not guilty of the defendant. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge against him. You are to be governed therefore solely by the evidence introduced in this trial and the law as given you by the Court. The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice, public opinion or public feeling.

Both the public and the defendant have a right to demand, [fol. 943] and they do so demand and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be.

The offense with which the defendant is charged is mail fraud. In this connection you are instructed that the indictment on file herein is a mere charge or accusation against the defendant, and is not any evidence of the defendant's guilt. And no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of such indictment on file.

It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged, considering all the evidence submitted to you in the case.

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them, and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence should be taken into consideration for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This [fol. 944] presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any,

or his bias or prejudice, if any, against the defendant, by the character of his testimony, or by evidence affecting his character for truth and honesty or integrity or by contradictory evidence, and the jury are the exclusive judges of his credibility.

A witness may also be impeached by evidence that he made at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness false in one part of his or her testimony is to be distrusted in others. That is to say, the jury may reject the whole of the testimony of a witness who has wilfully sworn falsely to a material point. And the jury being convinced that a witness has stated what was untrue, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, must treat all of his or her testimony with distrust and suspicion, and reject all unless they shall be convinced that notwithstanding the base character of the witness, that he or she has, in other particulars sworn to the truth.

The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness or to comport with some fact or facts otherwise known or established by the evidence.

[fol. 945] You must not consider as evidence or law any statements, arguments, comments, or suggestions made by counsel during the trial. However, if counsel for either side have admitted or stipulated to the existence of any fact, you must consider it proved without further evidence.

You must not consider for any purpose any evidence offered and rejected, or which, after being received, has been stricken out by the Court. You must decide the case solely upon the evidence before you and the inferences which you may deduce therefrom, as they are stated in these instructions, and upon the law as given you in these instructions. There are two kinds of evidence by which the government may sustain charges laid in an indictment. The one known as direct and positive, the other as indirect or circumstantial. Evidence is said to be direct and positive when the witnesses have testified of their own knowledge to matters having a direct bearing upon the issues in the

case. Evidence is said to be indirect or circumstantial, on the other hand, when the witnesses have testified of their knowledge to matters having only an indirect or circumstantial relationship to the issues in the case.

While you may show what a man does by direct evidence of eye witnesses, the only way you can show what he intends and believes or what his plans or purposes are, or were, is by circumstantial evidence.

[fol. 946] The law requires that all the circumstances necessary to show guilt must, of themselves, be shown by evidence beyond a reasonable doubt, that these circumstances must all be consistent with one another, that they must all be consistent with a defendant's guilt, and that they must all be inconsistent with any reasonable theory or hypothesis except that of guilt.

If the circumstantial evidence measures up to all the foregoing requirements, it is the duty of the jury to return a verdict of guilty. If it fails to do so, in any one of such particulars, your verdict should be not guilty.

The indictment in this case returned by the Grand Jury for the Southern District of California on March 1st, 1961 is in thirty counts.

Count 1 sets forth the alleged scheme to defraud and has been read to you.

The remaining counts of the indictment incorporate by reference the allegations of Count 1 but charge separate mailing violations.

The indictment is brought under Section 1341 of Title 18, United States Code, which provides in pertinent part as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or

at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be guilty of an offense."

The elements of an offense under the Mail Fraud Statute are:

First, a scheme devised with intent to defraud or for obtaining money or property by means of false pretenses, representations, or promises, and

Second, for the purpose of executing or attempting to execute such scheme, the placing or causing to be placed of any letter, matter, or anything whatever in any Post Office of the United States or other authorized mail depository to be sent or delivered by the Post Office establishment or the taking or receiving therefrom of any such letter matter or anything whatever.

[fol. 948] Each of these elements must be proved by the government beyond a reasonable doubt, as to each count, before you can find the defendant guilty of such count.

You are instructed that as to each count of the indictment before you that you cannot find the defendant guilty unless he was a party to the scheme or artifice to defraud or to obtain money or property by false and fraudulent promises and representations at the time of the use of the mails referred to in that count. Thus, if a defendant had not yet become a party to such scheme or plan so that he was not a party on the date of the use of the mails, you must find him not guilty as to such count.

It is not necessary for the government to prove that the scheme to defraud was devised at any particular time prior to the use of the mails alleged in the indictment so long as such scheme to defraud is proved to have existed when the mails were used in the execution thereof. The gist of the offense is the use of the mails.

Each separate use of the mails for the purpose of executing a scheme to defraud and for the purpose of obtaining money by means of false pretenses, if charged and proved, is a separate and distinct offense. In this connection, you are instructed that each individual act of placing or causing to be placed of matter in any post office or taking or receiving matter from the post office in furtherance of

[fol. 949] such a scheme constitutes a separate and distinct offense.

I charge you that it is not enough, for the prosecution to show the existence of a plan or scheme to defraud or to obtain money or property by false or fraudulent promises and representations, and the membership therein of any particular defendant. This alone would not prove that the defendant participated in the plan or scheme "knowingly and wilfully". With respect to said defendant, the prosecution has the further burden of proving beyond a reasonable doubt that the defendant participated in such agreement wilfully; that is, the prosecution must prove that such defendant entertained the specific intent to defraud or to obtain money and property by false and fraudulent promises and representations.

If you are not convinced beyond a reasonable doubt that the defendant acted "wilfully" your verdict must be not guilty.

It is not essential that the government prove each and every false pretense, representation or promise alleged to have been made or intended to be made, but it is essential that proof be made that the defendant did devise the scheme to defraud of substantially the kind and character alleged, and that he employed any one of his false and fraudulent promises, representations and pretenses alleged, and in furtherance of such scheme used the United States mails or [fol. 950] caused them to be used substantially in the manner alleged in the indictment.

You will note that the acts charged in the indictment are alleged to have been done with "intent to defraud".

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive, for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.

In every criminal offense there must be concurrence of with act and intent. This is especially true in an offense like the present one which requires that the act shall be done knowingly and wilfully.

This intent is a material element of the offense which, like all others, must be proved beyond a reasonable doubt.

In determining the question, you are to consider all the facts and circumstances in the case which touch the conduct of the defendant, as well as the declarations and admissions, if any.

Criminal intent may be implied from the acts, conduct, declarations or admissions of the defendant. Such acts, conduct, declarations and admissions, as shown by the evidence considered in relation to the charge made, may establish criminal intent beyond a reasonable doubt.

You will note the indictment charges that the offense was committed "on or about" a certain date. It is not [fol. 951] necessary that the proof establish with certainty the exact date of the alleged offense. It is sufficient that the evidence shows beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

You will note that under the indictment the acts are alleged to have been done knowingly, wilfully and unlawfully. The word "knowingly" when applied to an act or thing done imports knowledge of the act or thing so done as well as an evil intent or bad purpose of doing such act or thing.

Differently put, an act is done knowingly if done voluntarily, and not because of mistake, inadvertence or other innocent reason.

An act is done "wilfully" if done voluntarily and purposely and with the specific intent to do that which the law forbids. That is to say, with evil motive or bad purpose either to disobey or to disregard the law.

The word "unlawfully" as used in the indictment means that the act which is so characterized proceeded from a criminal intent and evil purpose.

They import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such act. They exclude all color of right and excuse for the act.

The law does not require any defendant to prove his innocence, which, in many cases, might be impossible, but on the contrary, the law requires the government to establish his guilt by legal evidence and beyond a reasonable doubt.

[fol. 952] The presumption of innocence with which the defendant is at all times clothed is not a mere form to be dis-

regarded by you at pleasure. It is an essential substantial part of the law and is binding on you in this case.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find the defendant not guilty.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the government to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, then you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of a defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Reasonable doubt is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds [fol. 953] of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon the failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out in cross examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence.

You are instructed that the word "scheme" and "artifice" as used in the mail fraud statute include any plan or course of action intentionally devised for the purpose of deceiving and tricking others and thus fraudulently obtaining their money or their property. It is not essential to the making out of the charge that the scheme or artifice should have

been successfully carried out, or that the defendant made a profit on the venture.

You are instructed that it is conscious fraud which is punished. Therefore, although men may be visionary in their plans and believe that they will succeed, yet in spite of the ultimate failure of the concern, they may be wholly innocent of committing a conscious fraud. Therefore, if [fol. 954] you believe that the defendant actually entertained the belief of the ultimate success of the project, corresponding with the representation made, then the defendant did not commit the offense charged, and you should return a verdict of not guilty. The significant fact is the intent and purpose. The question presented to you in this case is not whether the business of Ralph Hastings was practical or not. If you believe from the evidence in this case that the defendant acted in good faith, then you must return a verdict of not guilty against the defendant, no matter how visionary might seem the plan or judgment of the defendant.

There is nothing fraudulent about agreeing or offering to deliver in the future that which the person so promising or agreeing does not presently possess. It is only when prior to the time of making of the agreement or offer he has no intention of fulfilling his commitment, that the offer or agreement is fraudulently made.

In this connection you may also consider other communications that have been introduced into evidence other than those set forth in the 30 counts of the indictment. But other matters admitted may be considered by you upon the question of showing the intent of the defendant at the particular time charged as to whether or not there was in fact in existence a scheme or conspiracy to defraud as charged.

Evidence that an act was done at one time or on one [fol. 955] occasion is not any proof whatever that a similar act was done at another time or on another occasion. That is to say, evidence that a defendant may have committed an earlier act of a like nature may not be considered in determining whether the accused committed any offense charged in the indictment.

Nor may evidence of alleged earlier acts of a like nature be considered except as bearing on intent.

If the jury should find beyond a reasonable doubt from other evidence in the case that the accused did the acts charged in the particular count under deliberation, then the jury may consider evidence as to an alleged earlier act of a like nature, in determining the state of mind or intent with which the accused did the acts charged in the particular count.

That the defendant, in a particular case involving issues such as are here involved, intended to defraud by the scheme claimed to have been devised by him, may be inferred from the circumstances in the case. The existence or lack of fraudulent intent necessary to constitute using the mails to defraud rarely appears except by inference from all the facts and circumstances in the case. It is not necessary that the prosecution prove such intent by the admissions or by the express assertions or statements of the defendant as to what his purpose was in devising the alleged artifice or scheme to defraud.

[fol. 956] Fraudulent intent may be proved by circumstantial evidence.

Any omission from a statement or representation of qualifying or supplementary facts and circumstances such as to render so one-sided a version of the facts, as to amount to a travesty and not a truthful summary thereof, is enough to establish a misrepresentation.

To state a thing which is only true with qualifications, or subject to conditions, known to the person making the statement, but as to which he is silent, is to make an untrue statement. It is familiar law that a fraudulent representation may be effected by half truths calculated to mislead. Sometimes a half truth is no better than an outright falsehood. Having chosen to speak, there is an obligation to tell the whole truth. And a statement, although literally true, is nevertheless false, if, when understood by the effect it would produce on an ordinary mind, it would create a false impression of the true state of affairs.

The law presumes that the defendant did not intend to defraud. This presumption of law is a matter of evidence and has of itself sufficient force and effect to require you

to find the defendant not guilty unless, after fully and fairly considering all of the evidence in the case, you are convinced beyond all reasonable doubt and to a moral certainty that the defendant is guilty in the manner and form as charged [fol. 957] in the indictment.

The effect of the representations that were made is to be determined by the impression they would likely produce upon a mind of ordinary prudence and comprehension.

If the representations are designed to mislead they are proscribed by the statute.

The guilt of a defendant may be established without proof that the accused personally did every act constituting the offense charged.

The law provides:

"Whoever commits an offense against the United States, or wilfully aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal."

and

"Whoever wilfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Every person who thus wilfully participates in the commission of a crime may be found to be guilty of that offense. Participation is wilful if done voluntarily and purposely and with specific intent to do what the law forbids, or with specific intent to fail to do what the law requires. That is to say, with evil motive or bad purpose either to disobey or to disregard the law.

[fol. 958] You are instructed that matters of fact, if any, which are left uncertain by the evidence cannot be made certain to the prejudice of the defendant by inference. In the absence of evidence, no inference can be drawn by the jury against the defendant but, on the contrary, all inferences and presumptions consistent with the facts proved are to be drawn and indulged in favor of the innocence of the defendant.

While a defendant in a criminal action is not required to take the stand and testify, yet if he does so, his credibility and the value and effect of his evidence are to be weighed and determined by the same rules as the credi-

bility and effect and value of the evidence of any other witness is determined. And the tests I have given you for determining the credibility of witnesses must be applied to his testimony also.

A defendant is not required to prove a fact beyond a reasonable doubt nor by a preponderance of the evidence. It is enough if the evidence he produces is sufficient to create in the minds of the jurors a reasonable doubt with respect to any of the facts essential to constitute the offense.

Both the Government and the defendant are entitled to the individual opinion of each juror. It is the duty of each of you to consider and weigh all the evidence in the case, and from such evidence to determine, if you can, the [fol. 959] question of guilt or innocence of the defendant. When you have so determined that question, you should not be influenced in giving your verdict by the mere fact that any number or all of your fellow jurors may have reached a different conclusion. If after careful consideration of all the evidence your mind is fairly made up and you are convinced that you are right, it will be your duty to stand by your verdict. But each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be justly drawn therefrom. This it is his duty to do. This after such a full and fair discussion any juror is satisfied that his original decision was wrong, then he should unhesitatingly abandon such decision and render his verdict according to such final decision.

The first duty upon retiring to the jury room to begin your deliberations will be to select one of you as foreman.

As you have already been informed the jury in criminal cases in Federal Court is what is known as a common-law jury. That is, all of you must agree before a verdict can be returned upon any count of the indictment. This would also be the rule in state cases except that we are governed by that rule even in civil cases. Unanimity of verdict is required.

For your assistance the clerk has prepared a form of verdict which reads as follows:

"We the jury in the above-entitled cause find the defendant Mortimer Singer blank as charged in Count 1 and blank as charged in Count 2 and down to Count 30."

If you reach a verdict as to any of the counts, a unanimous verdict, you will insert the proper word. If you find the defendant guilty as charged in Count 1 of the indictment you will put in that word, If you find him not guilty you will put in those words. And the same way as to each count of the indictment.

While the same scheme to defraud is alleged as to all, and there being only different mailings, a scheme to defraud is alleged in Count 1, you are not required by any law of consistency to find a verdict, the same verdict as to all the counts. If you are satisfied that one verdict should be returned as to one count and another as to another, you are free to say so by your verdict. In other words, whether you find the defendant guilty or not guilty of a particular count in the 30-count indictment it is up to you to determine in accordance with the rules I have just given to you.

When you have reached a verdict it should be signed by the foreman at the place indicated and dated at the place indicated at the bottom and returned to the Court.

Are there any objections to the instructions given or those refused? If so opportunity will be given to counsel to both sides to present them outside the hearing of the jury. [fol. 961] Mr. Campbell: I would like to call your attention to one word, your Honor, which if I may I would like to do at the side bar.

(The following proceedings were had at the bench out of the hearing of the jury.)

Mr. Campbell: Your Honor inadvertently said "scheme or conspiracy to defraud as charged in this indictment."

The Court: No, I never used the word "conspiracy".

Mr. Campbell: Yes, it was used shortly after—there was a pause. You paused in your instructions while you were making some corrections.

(Record read.)

(The following proceedings were had in open court within the presence and hearing of the jury:)

The Court: Ladies and gentlemen, I made a mistake in using a word that I did not intend to use at all, and coun-

sel have called my attention to that fact. In fact, that is what the law provides, that we are to give them an opportunity to call attention to an error that may have been committed so we may correct it.

So I will reread the instruction in which the error occurred and leave it as it should be. I think I will read the instruction which precedes it because it will show better in context.

There is nothing fraudulent about agreeing or offering [fol. 962] to deliver in the future that which the person so promising or agreeing does not presently possess nor has the means to acquire, so long as he in good faith intends to deliver under the terms of his promise or offer. It is only when, prior to the time of the making of the agreement or offer he has no intention of fulfilling his commitment, that the offer or agreement is fraudulently made.

In this connection you may also consider other communications that have been introduced into evidence other than those set forth in the 30 counts of the indictment. But other matter admitted may be considered by you upon the question of showing the intent of the defendant at the particular time charged, and as to whether or not there was in fact in existence a scheme to defraud as charged.

Any other?

Mr. Thornton: I have nothing, your Honor.

Mr. Campbell: Nothing further, your Honor.

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TRANSCRIPT OF RECORD
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1963
IN ELEVEN VOLUMES
No.

MORTIMER SINGER, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.

VOLUME ELEVEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

[fol. 1000]

VOLUME B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

TRANSCRIPT OF PROCEEDINGS
Los Angeles, California
Tuesday, May 1, 1962

OPENING ARGUMENT ON BEHALF OF THE GOVERNMENT
[fol. 1001]

Mr. Thornton: If it please the Court, Mr. Campbell, Mr. Johnson, ladies and gentlemen: I will address you for approximately an hour. The time will be divided between opening argument and closing argument. After the government, as you probably know, finishes the opening argument, defense counsel has his opportunity to present his argument, and the government has a chance for rebuttal. I expect the total time I will take will be approximately one hour.

The indictment as you are well aware was in 30 counts. [fol. 1002] It referred to 29 different people.

Leola Thompson was in Counts 26 and 27, the person named in both of those counts.

The Court: I do not think the jury can hear you, I can't hear you.

Mr. Thornton: Counts 1 through 17 inclusive refer to mail matter that was going from Los Angeles from the Ralph E. Hastings Company to the amateur songwriter. Counts 18 through 30 refer to the receipt of money, money that was being transmitted by the amateur songwriter to the Ralph E. Hastings Company.

If there is a fraudulent scheme it is a violation of law even though the money is coming this way into the operation; for you are causing that as part of the scheme.

We have entered into a stipulation that you will be able to examine. In Counts 18 through 30 we set forth the exact date on which the money was received by the Ralph Hastings Company. That will be somewhat different than the date in the indictment. However, the government is not bound to establish with pinpoint accuracy the date on which mail matter is received. In this case it is not a point of argument. We have stipulated to the date on which it was received.

Ladies and gentlemen, I would like to go through what we consider the basic scheme in this case. We submit to you here that there were three separate deals, at least in my [fol. 1003] logic of developing the argument it seems to be divided that way. First, there was the Madhatters.

Demonstration record, 78 rpm for \$87.50. If you did not accept that that you are propositioned with the Ken Starr 78 rpm recording for \$44. And then lastly it would flow from either of these two, you were offered to have 45 rpm records, 100 records, pressed for \$94.

In one case only, Mrs. Margaret Hardcastle, who appeared as a witness, she had a reduced rate of 50 records for \$47. Oh, in two cases, also Hollis Taylor, and in another case which was a 1957 contract where they obtained a Madhatters recording for \$77.50. But basically the deal was for \$87.50. So we have three things, the Madhatters, Ken Starr, and then the production of 45 rpm, 100 records for \$94.

The basic letters: The first one starts out:

"The Madhatters have informed me"—with that letter was the royalty agreement, and also enclosed with that initial letter was the Madhatter circular.

There was miscellaneous correspondence, and where we have it it has been admitted into evidence.

The next letter "Your communication advises us you do not have an orchestration or vocal arrangement."

Next the main point of contract:

"As we both understand you are not required" and so forth, to have any further development.

[fol. 1004] Fourth "It is my desire to handle hits."

And the next thing was the telegram. We will go through that.

And then following that, although the contract was for six months, we will show that generally February of 1959 the closing letter:

"Our contract is all over, it was only for six months."

Those are the letters that I would like to go through with you.

I ask you to put yourselves in the frame of mind of an amateur songwriter who submitted a letter to a Hollywood firm and had received either a lead sheet in which the company had placed music to your lyrics, or even if it went further, and you had received your records, a piano-vocalist together, you are sitting at home, and you are receiving this first contact. What would be your reaction?

"The Madhatters have informed me that they are willing to record your song with orchestra at a session now being scheduled, and have requested that I contact you for the necessary permission.

"I am the Madhatters' person manager. As I understand the song which the Madhatters refer to is one of your compositions they learned of from a publisher's agent who is either handling your song or has handled it in the past. [fol. 1005] The title of the composition is 'Freckle-faced Lover.'"

With that you received this Madhatters' circular.

"The new Madhatters Trio."

Three people pictured yours. Motion picture credits, statements by well-known Hollywood personalities; Gene Russell, Marilyn Monroe, Charles Coburn.

"Recently Desert Inn, Las Vegas, Flamingo. Recently Colgate Comedy Hour, Jimmy Durante, Ford Theatre. Personal manager Ralph E. Hastings."

What would be your reaction? What have these people testified to? What is the reaction of an ordinary person of ordinary prudence and comprehension? What have they told you? This is the whole point of the government's case, the main thrust of the case. It is not a question of whether or not they lived up to their royalty agreement, which we will submit they made a sham attempt to, an effort to deceive people, give the appearance of complying. That is not the question of whether they lived up to their contract. They deceived you at the outset into entering into the contract. They induced you by false representation.

If you took this at face value, they appear to be red hot. They are appearing on television, in top night clubs in the city, Las Vegas, Colgate Comedy Hour, which is a top television program. They appeared in motion pictures. They tell you this group is interested in your song. They [fol. 1006] are not interested in a thousand songs, they are interested in your song.

"I am the Madhatters' personal manager."

What does "personal" mean to you? Never met Ralph Hastings, not even at his son's wedding where he introduced Mr. Singer as Ralph Hastings. Some time after that they found out who he was.

You were told that the Madhatters had requested Ralph Hastings to get the necessary permission because they are interested in recording your song.

As I understand it the song which the Madhatters refer to is one of your compositions they learned of from a publisher's agent who is either handling your song or has handled it in the past. The song went from you to Music-makers for a dollar a name on a customer's list, I think that is what Mr. Freed testified to, it went Sanford Dickinsen, to Ralph Hastings.

The Madhatters never learned of your song until you paid \$87, and they were ready to record it. It was played on a tape. They received the tape to listen to. Then they came down and sang 15 or 20 songs in a two or three-hour session, \$2.00 apiece, a total of \$6.00 for the trio.

He puts in a letter that he wants your permission for a song they have learned of from a publisher's agent. They didn't even learn of it until this offer was accepted. They [fol. 1007] didn't learn of the publisher's agent. You are the publisher's agent. Then we get to the sixth paragraph:

"If you do not have an orchestration and vocal arrangement for the song, if you have difficulty in obtaining this let us know."

It is going to be a free deal, of course.

In all their thousand songs how many free deals were there? We didn't have their books and records. Mr. Singer testified there were ten or eleven and they accepted eight or nine. I do not imagine they were in business three months before they realized that these people didn't have vocal arrangements and orchestrations.

There is considerable question whether you even need it for a Ken Starr recording.

So the free offer wasn't all that it appeared to be.

The royalty agreement tells you you are going to get 90 percent of all royalties. 90 percent of nothing is nothing,

and 90 percent of 48 cents isn't outstanding or much of a return on your investment.

In that second paragraph there is one phrase: "The author hereby"—I'm referring to the royalty agreement that went out with the first correspondence—"the author hereby grants to the agent the right to record said composition with vocal group known as the Madhatters and orchestra and to retain a master copy of said recording at Studio 3."

[fol. 1008] Remember Studio 3? Really Room 3, 12 by 19. "At Studio 3, Producers Motion Picture Studios, for the purpose of creating an audition recording to be made available for motion picture musicals."

What does "made available" mean? At the first location, Producers' Studio. Then when they moved the first of the year it was their office at 7901 Crenshaw.

Does that mean if a producer happened to stumble into Room 3 and request this, then it would be available, or if he happened to find that other location on Crenshaw, if he found that alleyway and walked down to an office that didn't have any sign on it and happened to find Rose Zucker, and he asked the right question, would it be made available, or did it mean that some positive efforts were going to be made?

That's the first contact you have had.

Is the government presenting a fair inference when they basically told these people that a professional group that was appearing in Las Vegas and on television thought this thing had merit, and they were contacting you before this work was done on it to get your permission. You induced the contract regardless of whether you lived up to a meaningless royalty agreement. Before those people signed you made false representations on this phase of the program, the \$87 deal.

Let me go into this circular for a minute. As you know [fol. 1009] the Madhatters Quartet is a male quartet. I think Mr. Moody and Mr. Tippie testified. One said in 1954 and '55 was the last time that quartet appeared in Las Vegas. This literature goes out. The one I was reading was July 18th, 1957. That is some of the earlier literature.

It went out through 1958. What does "recently" mean to you in the entertainment field? You are not an entertainer, you are a normal citizen in any state in the union. Does it mean the last couple of weeks, last month, last six months, the last entertainment season, the last year? By any stretch of the imagination does it mean four years?

This is all based on Warren Tippie's approval. I want to talk about Warren Tippie's approval on the Madhatters' circular Exhibit H and the letter prepared by Mr. Dickinsen which he signed, Exhibit G, which Mr. Tippie signed.

First of all Mr. Tippie doesn't have any authority to give anyone any rights to misrepresent. They argue, well, the personnel is always changing. The managers are always changing. Aren't you indicating that that group appeared there recently? Aren't you indicating that Ralph E. Hastings is putting these people in motion pictures, or at least attempting to do so, he is attempting to put them in television, is attempting to put them in Las Vegas, in night clubs. Let's read their own agreement which they brought in dated January 22nd, 1958 addressed to Mr. Dickinsen.

[fol. 1010] "Dear Mr. Dickinsen:

"This letter is to confirm our original oral agreement and understanding entered into prior to the first Madhatters session on the Hastings' songs. This refers to a series of recording sessions by the Madhatter Trio and orchestra. It is our understanding that a party agreeable to you and doing business as Ralph E. Hastings will supply new songs for our recording approval."

That is interesting, isn't it?

The last paragraph:

"It is further understood that said party is the Madhatters' personal manager."

Now reconcile these two, where he puts "personal manager" for television, Las Vegas, night club appearances.

"It is limited, however, to the recording session and the records. The songs for same to be supplied by said party. It is understood and agreed that all publicity relating to the Madhatters created by said party doing business as Ralph

E. Hastings is to be first submitted for our approval as was the circular entitled 'Successful on tour, now sensational in Hollywood, the New Madhatters Trio.'"

The only approval they were given, if they couldn't sing it then it was rearranged. Mr. Tippie was asked how many [fol. 1011] songs did he reject in all. He said about two or three out of 900.

"It is further understood that we are willing to record said songs if found satisfactory to us if permission is sought from and granted by the author of the composition."

He is limited to this record as to this particular song. Any limitations on that representation, that circular?

Let us assume that you wrote back and said, "Well, we are interested in something but we do not have the vocal arrangement and orchestration."

Then the next letter. This is the second main point of contact. Your communication advises that you do not have an orchestration or vocal arrangement. Of course it will be necessary to have both a vocal score for the Madhatters and the instrumental arrangement for the orchestra behind the Madhatters.

The director of recording, who is he? Is that the owner of the record studio?

"The director of recording has been informed of your advice that no orchestration or vocal arrangement is available. He advises that he can have the necessary arrangements prepared for both the studio orchestra and the Madhatters. The Studio 3 scale rate for both the orchestra and [fol. 1012] vocal arrangement will be in this case \$77.50."

This is a letter which says at the top "Ralph E. Hastings Producers Motion Picture Studios."

We found out that was the name of a building, Studio 3, 5634 Santa Monica Boulevard, Hollywood. Well, it is Room 3. The studio as such doesn't have a scale rate. What does he call it? "Studio 3 scale-rate."

The owner of the building who did production work at this time said that it is handled by the union, there is no studio scale rate. Actually Mr. Singer told us what it was, what Mr. Dickinsen's role in this whole affair was. Was he

a partner? No. He was receiving \$30.50 on a 78 rpm, and he was receiving \$80 for each record where they ordered 100 records.

Incidentally, when I recall the testimony, if it differs from your recollection, of course rely on your own recollection and not mine. But at any rate, it is my recollection that Mr. Singer testified they didn't think that covered the orchestration and vocal arrangements which were \$12. They were making a profit on \$87.50. That was the whole purpose of the operation, to give the impression that this \$87 was just going to be handed out to Studio 3, \$77.50.

If you desired it you would write in. Then you sent in your \$87.50. That more or less completed the Madhatters' [fol. 1013] operation.

Let us just talk about Ken Starr. The letter I have is from the Beebe folder we made up.

"If you recall we advised you that Ken Starr and the Vincent Poli orchestra are willing to record your song. We have secured publication under standard royalty terms for quite a few of Ken Starr and Vincent Poli orchestra recorded songs. We have taken the liberty of discussing your song with the publisher. You will be glad to know that the publisher is willing to issue standard royalty contracts for the immediate publication of the song. The publisher makes no charge to you for the right of publication. Under the terms of their standard royalty contract you will be entitled to royalties on song folios sold and paid for containing your song."

And as we know that publisher is never identified in any Ralph Hastings' literature. Never. We also know who it is, Dallas Turner, Eagle Pass Music Publications.

"This publisher has placed under contract successful radio, TV recording and stage personalities and is issuing a series of song folios featuring these artists. The publisher has agreed to issue standard royalty contracts for the publication of your song featured in folio providing we supply him with a demonstration recording of the song by Ken Starr and the Vincent Poli orchestra. The publisher has insisted on this recording for possible exploitation purposes."

I want you to bear this in mind when we go on to what happens to the Madhatters. Here we are telling him to get the \$44 Ken Starr recording. To satisfy Dallas Turner we have to have a demonstration record. But on the Madhatters it is not until you get the \$94 over that they then tell you it is not a demonstration record that Dallas Turner has to have, he has to have 100 records to meet his disc jockey contact. Why would the difference between Ken Starr, where they want a demonstration record and the Madhatters which has got to be 100 records? It's just the difference in the sales pitch.

Incidentally, the people who received Ken Starr records of course had no leaflet on Ken Starr but they still had received previously this literature which indicated the personal manager Ralph Hastings for this other group, and they put their name right on the heading there, the Madhatters, that he was personal manager of the group that appeared in motion pictures, television, and night spots. So you have the impression that this Ralph Hastings is the man in the know, man on the move, a man that can do something for you.

[fol. 1015] So this fraudulent representation still carries over. You carry Ralph Hastings on the top of your literature.

But that basic point I want to get to, when they made the approach to Ken Starr it was because they had to satisfy Dallas Turner who wanted a demonstration record. When they made the approach for the \$94 for 100 records of the Madhatters it was because he needed it, because you already had your demonstration record, they couldn't use that same idea again, so now he said he needed 100 records for his disc jockey contact.

I do not want to jump ahead of the story, but this letter is dated September 22nd, 1958. You remember the whole big argument about Bakos. "We never used any contracts after that." I think it was September 9th, 1958. It doesn't have the year but he said by checking these invoices it would show that it was 1958. So they are still talking about Eagle Pass contracts September of '58. You will remember in September of 1958 that "The publisher has agreed to issue standard royalty contract for the publication of your song

and feature it in folio providing we supply him with a demonstration recording of the song by Ken Starr." Did he put it out on folio? This is September 22nd, 1958. Do you recall the stipulation that we agreed to? I want to read that to you. When was the last folio they published we know of?

Page 847 of the transcript, it's Volume 7.

[fol. 1016] Mr. Campbell: It will be stipulated that if called to testify the Artisan Press at 1455 Gordon Street, I believe that is, Hollywood, would testify that on five occasions in 1958, to wit, March 20, May 15, May 21st, June 24th, and July 20th, song folios, song books were published or printed by them for the Eagle Pass Music Publications in quantities of a thousand each."

It could be printed by another company, that's a possibility. We have no evidence of it.

That's the Ken Starr approach now. \$44 because Dallas Turner needs a demonstration record.

Now we finished two sections. We finished the Madhatters for \$87.50, and we finished Ken Starr for \$44. Now let's go on to the 100 records for \$94. The next main point of contact as I say is this following letter. And this was Mr. Beebe.

"As we both understand you are not required or obligated to expend any further moneys for the development specified in the agreement which covers the recording by the Madhatters and the availability of that recording for motion pictures, television and radio."

That's an interesting word "availability."

"The song has been recorded by the Madhatters and is in our opinion a very fine recording."

[fol. 1017] This letter is for the purpose of advising you of that if you desire to have the recordings pressed on commercial records and distributed to certain key disc jockeys.

What is a key disc jockey? Is that a disc jockey where they take his name out of a book here and you give it to Rose Zucker and you say "You type up a list of disc jockeys"? Is that what you call a key disc jockey?

At the same time advertise to record stores. What are you going to advertise to record stores? The Madhatters'

recording? The song by Leo Thompson? She comes from Colorado. No attempt made to send the literature to Colorado, it was just sent, broadcast throughout the United States. I'm not a salesman, but if I had a Madhatters recording and the Madhatters were anything like was represented here wouldn't you at least tell the people it was a Madhatters' record? No indication on this literature that it is a Madhatters' recording. When those records went out no indication on here that it is a Madhatters' recording. Were they really interested in selling the record or was it just a sham? These documents prepared by Warren Tippie were prepared in 1957 because of that fateful eventuality that maybe the Postal Inspector might be breathing down their throats or they might get to court. Is that why we did this sham mailing service? No record on here of Madhatters. There is an M. H. in the circles. M. H. stands for [fol. 1018] Madhatters. Remember Mr. Washburn, the man that made these records mentioned "Madhatters? I have forgotten. That's what M. H. stands for."

What about the disc jockey, what is M. H. going to mean to him? Is he going to be interested in playing a record if he doesn't know who recorded it? Or the record dealer, if you pick his name out of the book, you don't tell him prices, no prices indicated. We don't tell the full name of the author. "BE MINE by Thompson." Supposing it was by Foster? Does it mean anything? Stephen Foster might mean something. If it was in Rifle, Colorado, maybe Leo Thompson's name might mean something. Thompson doesn't mean much.

You saw Mr. Singer on the stand. You have observed him during this trial. Mr. Singer is an intelligent man. Mr. Singer couldn't sell a product if he wanted to, if the product was salable. He could certainly do much better than that. Look at that record. You pay \$100. That's what the witness said. What's my name on here for? Where is the Madhatters' name? I am looking for Ken Starr because I think Ken Starr's name did go on it. The only thing is nobody knew who he was, not even the people around him. They knew him as Ken Kenniston.

Listen to this: This is a Ralph Hastings Company writing.

"After the original 100 records are pressed we plan to [fol. 1019] contact disc jockeys and record stores."

"We plan." Ralph Hastings. Right.

"We will then send the selected disc jockeys a recording and the music stores a notice that commercial records of the song are ready and ready to put on sale."

They say "After the original 100 records are pressed we plan to contact the disc jockeys and record stores."

You want to make a contact. What are you going to do then?

"We will then send the selected disc jockeys a recording and the music stores a notice that commercial recordings of the song are ready and available to be put on sale."

Is that a two stage project or not, or is it fair that Mr. Beebe might infer that. You are going to write to disc jockeys, you are going to contact them, then selected disc jockeys are going to get the record. That wasn't the procedure followed in this case.

Of course maybe Mr. Beebe misinterpreted that. Maybe no one should follow that. You should just assume they are going to pull names out of the book, give them to Rose Zukor and away it goes, the whole list of them. Why do you say "key disc jockeys"? Why do you throw out these big words "selected disc jockeys" after you have had an initial [fol. 1020] contact? You know why and I know why, because that induces somebody to send in \$94.

Once again you are entitled to 90 percent of all royalties. That is the conclusion of the letter. The folder also contains the folder about the Christmas records or rather lead sheets, 250 for \$32. We did not allege that in the indictment. I will not cover that in the argument.

In the event you didn't go for that letter you got another letter. Let us see the sequence here. You got the letter offering 100 records on October 23, 1957. Then you got a letter on February 7th, 1958 as follows:

It is my desire to handle it. My opinion is that songs recorded by as fine a group as are the Madhatters deserve public attention. Many producers of motion picture musical and leading record companies prefer to consider published music.

Does that mean song folios or does that mean records?

In spite of the fact that my contract with you is specific representation of the record I believe that an attempt should be made to try to obtain—"

He is going to make an attempt to obtain a publishing contract. This goes out in May '58, July '58, August '58, and so on. His agreement with Dallas Turner was entered into on February 5th, 1958.

[fol. 1021] "With this in mind and with your permission I plan to enter into conversations with publishers."

There is no future plan to enter into. He has his agreement. He knew what he was getting from Dallas Turner.

"Many top recording artists and recording companies prefer a song be published before they negotiate a royalty contract. In the event any discussions I have with publishers develop an interest on their part I will advise you", et cetera, et cetera.

Here is a paragraph:

"I plan to negotiate."

This is what he says in February, May, August.

"I plan to negotiate with active, responsible publishing companies on a basis where the publishers pay all costs of publishing under standard royalty contracts."

Why are you leading these people to believe you are going out on the street with their record to negotiate? You had a deal with Dallas Turner. We will talk about his activities and responsibilities later.

"I will make no commitment until I advise you of any offers that might develop and secure your approval."

That was followed by the telegram. This one is Lucille Chance. ROCK AND ROLL YOUR BLUES AWAY. Accepted by publishing firm on standard royalty contract.

[fol. 1022] "We must manufacture commercial type records to cover publishers and disc jockeys."

Is that so? On Ken Starr he is happy with the demonstration record, but on Madhatters he must have commercial type records. What's the difference between the artists?

"Publisher will issue royalty publication contracts directly to you and I guarantee to him records are being manufactured. Record manufacturers assure me fast service. Publisher ready to go to press when records shipped to disc jockeys."

Go to press! Press what! More records or more folios? The Madhatters never made any references to who the publisher was or whether he was going to publish a pressed record or folios. But you were trying to sell a record.

"I checked publisher's royalty contract. Can carry standard terms."

"As previously advised the cost to you for the record will run \$94. If necessary can start preliminary manufacturing steps at \$50."

"We must manufacture commercial type records to cover publishers, disc jockey contact."

Now it's a switch. Why did he send the telegram. When you had an agreement with a man in February to put this stuff out why do you send the telegram in August or May? To create a sense of urgency. Get with it. Hurry, hurry, [fol. 1023] hurry.

"To cover publisher's disc jockey contacts."

What disc jockey contacts did Dallas Turner have? Is there any evidence that Dallas Turner ever mailed out any of these? What happened to the original agreement? They accepted \$94.

How many did he need? It doesn't say how many he needs.

On the Ken Starr records 28 people were named in the indictment. Only nine people accepted the Ken Starr only. Two took the Ken Starr record for 94.

Virtually everyone that took a Madhatter record sent the \$94 in.

Now I have gone through everything except that last closing letter. There are two forms. One is a signed contract with Eagle Pass and one that wasn't. Let me go to the one in the Beebe file. Many of them didn't go out dated. This one is dated December '58. Most of the ones in February did not go out dated.

"Inasmuch as your song recorded by the Hastings Company has been placed under publication contract in which you have transferred certain rights to the publisher, a six-months percentage recording contract executed by you and R. E. Hastings is automatically terminated. With our understanding and agreement you are allowed to enter into [fol. 1024] a publishing contract with the publisher. In spite of our 10 percent recording right we no longer are entitled to this 10 percent and hereby relinquish the same. In view of the fact that the song is now under publication contract all further negotiations or correspondence should be handled directly between you and the publisher."

That brings us once again to the point: Who is the publisher. That is more or less the end of the Ralph Hastings correspondence. Who is the publisher? The publisher was Dallas Turner, Eagle Pass Music Publications. Dallas Turner in 1958 at the time of the operation got a \$1,000 loan from Mr. Hastings. He did use it to promote these songs. He also used it for personal expenses.

What sort of a business did Mr. Turner have? Had he recorded any songs previously and published any recorded songs? No. What sort of office space did he have? He had an arrangement with Mr. Hufstедler. He didn't pay rent. He answered the phone once in awhile and he had one desk. What was the relationship between Mr. Hastings and Mr. Turner? Well, in December 1958 he introduced Mr. Hastings to Mr. Henke in Texas as his agent.

Wasn't it an interesting conversation when they were coming down on the elevator and Henke said something like "I have been getting letters from my customers about Ralph Hastings. Who is Ralph Hastings?" [fol. 1025] This is their biggest account. This is Ralph Hastings. Henke introduces Mr. Singer.

This is an active and responsible company.

Then we come to the printing records of Mr. Bakos and we have the unpaid files which he keeps on his desk. Located in there is one September 19th, as stated before, 1958. Contract for Eagle Pass 500. Dallas Turner's name right on there. "Bill to Singer." Bill went out. It came in from a telephone exchange, AX 2-8161, motel in Los Angeles where Mr. Singer stayed. Mr. Singer states it was "While I was

in the Hominy Motel in Oklahoma", I would like to have seen the hotel record on that.

Furthermore, this says "Mr. Singer", it doesn't say whether it's Stephen or Mortimer. It could be either one of them.

Mr. Singer vehemently denies any business transaction where printing was ordered for Eagle Pass. He said they didn't keep good records. I think they are pretty good. The man has the invoice, his order sheet and the material he printed all stapled together.

Then in the paid bills we have that paid billed on one order for Eagle Pass and Ralph Hastings, one bill. Incidentally, if you check the letter of Eagle Pass it says "This letter is very important."

If you check Exhibits 1 to 30 you will find that this letter [fol. 1026] went out in September of 1958 also, or one similar to it.

He waves a 1957 invoice. He said, "Let's have it marked for identification so we can examine it." It is a coincidence that that bill was paid and wasn't for that material. On here you will find the written computations of Mr. Bakos. On here how he arrived at the computation, and you will find that the background and the basis of that computation is not the same. Also these were the unpaid bills and I think they include 1958 bills. This is dated December '57.

Did Mr. Singer try to confuse you at that point?

Ladies and gentlemen, I have used 50 minutes approximately, and I will reserve ten for closing. I would like to give you a quick synopsis. I want to refer to the indictment.

In the indictment the Grand Jury charges six specific misrepresentations and thirteen of what we refer to as implied misrepresentations. In other words, they didn't give all the facts, and they had a duty to give them all. It is not necessary that the government list each and every misrepresentation, but it must be to your satisfaction that they have proved one or more so that there is a fraudulent scheme. The Court will instruct you on the law, not counsel, so I will not go into that any further.

[fol. 1027] It is not necessary to prove them all, but you must be satisfied beyond a reasonable doubt that there were misrepresentations.

Just let me go into the sixth and I will not cover the other thirteen.

"That the Madhatters had learned of the compositions of said persons not from an independent publisher's agent."

"That the Madhatters as a vocal group had informed Ralph Hastings that they would be willing to record the songs of said persons now being scheduled, and that they, the Madhatters, contact the said persons."

The second, that a Madhatters' recording of itself would develop interest by publishers.

Third, that the agent would notify record distributors as soon as the 45 rpm records of each side were pressed, which pressing would be done upon the receipt by the defendants of \$94. That the defendants would negotiate for publication of music for said persons with active, responsible publishing companies.

Five, that the defendants were negotiating with a publisher that had placed under contract successful radio and TV recording and stage personalities, and that the defendants were issuing a series of song folios featuring these artists.

[fol. 1028] Six, that the defendants had made available the Madhatters recording to motion picture, radio and TV studios.

Just a couple of facts and figures on what happened here. Of the 29 people, 13 indicated from the evidence in the exhibits, purchased the Madhatters program plus the 100 records at \$94. There are four others where the evidence isn't complete but indicates they got both the Madhatters and the 100 records. You will have to draw inferences. I am saying 13 are clear cut.

There is evidence from which you could draw that inference.

One, as I explained before, and it is Mrs. Hardeastle. She got 50 records for \$47. That is the only one of that nature. There were two people who invested no money, Patricia Dick, who has appeared as a witness here. And

the other one did not appear. Young is the name. Count X. There was another one, Count XXIV, where they sent in \$50, but then in May of 1959 business was closing up so they returned the money.

Now if it is a fraudulent scheme . . . even though these people either had their money returned or didn't invest it, then it is a violation because the literature that was sent out initially was sent out for the purpose of defrauding. So it is not a necessary part of the scheme that they actually were defrauding.

[fol. 1029] Nine people purchased Ken Starr records. Of the nine only two went on to get the 100 records for \$94. That accounts for the 29.

Thank you. Nothing further, your Honor.

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[fol. 1030]

REBUTTAL ARGUMENT ON BEHALF OF THE GOVERNMENT

Mr. Thornton: If it please the Court, Mr. Campbell, Mr. Johnson, ladies and gentlemen: I would like to move rapidly and cover points which I believe need covering that counsel has brought up.

First counsel has referred to Item 3 of what we have alleged as misrepresentation in the indictment. I want to refer to that one specifically "That the defendants would distribute records of said persons to selected disc jockeys and would notify record distributors as soon as the 45 rpm of each of said person is pressed, et cetera."

In my opening statement before the trial I said that we didn't know whether they had been sent to the disc jockeys. It goes back to that literature in the first part where they say "key disc jockeys" and then they say "We will contact disc jockeys" and then the next sentence, and then "to selected". The testimony here does not indicate any type of selection. The only selection was the original one, one stage, when he gave Rose Zukor the book and said "Type up the list."

Counsel mentioned the analogy of the power of attorney and the limited type of agency. Let's see. That's quite a common thing in law, any type of law. The question is not [fol. 1031] that Mr. Hastings could not enter into a limited

power of agency, but why didn't he tell people about that, that his personal management was limited just to that record, that he didn't have anything to do with night clubs. Nothing wrong about that agreement. Why didn't he tell the people about it?

Oh, and he said "We never asked the Madhatters whether they selected the song." I think he was relying on his recollection, but as I said you are wrong on occasion and I am sure I am too. But on page 211 of the transcript, the testimony of Mr. Moody, and a question by me:

"Q. I want to show you a letter from Exhibit 1. I would like to read to you the first two paragraphs.

'The Madhatters.'"

Then at the end of the two paragraphs I said:

"Did you make a specific request by song title to have an opportunity to record it in this group?

"A. No, I didn't."

Then we asked Mr. Moody a question on page 662, line 8:

"Q. Would you tell us, did you select the songs?

"A. No, sir.

"Q. Would you tell us how this was arranged?

[fol. 1032] "A. Well, Mr. Dickenson brought the songs to us already arranged, that is, the chords written out, and the orchestra track, and then we put the orchestra track on our tape machine and we went over the manuscript, the music, while listening to the orchestra track. And if there was some parts that we thought my wife should sing solos in, or Mr. Moody or myself, we arranged it, we did our own arranging from that standpoint, in order to give a little more to the completed arrangement.

"Q. Was the same arrangement followed when Mr. Stephen Singer took over, that is, that they brought the songs to you?

"A. Yes, sir."

Now the production of Dallas E. Turner as a witness, in saying that we knew what he was going to testify to, we made the statement in open court that he refused to be interviewed the day before trial. Mr. Turner told you that he had appeared before the Grand Jury around Thanks-

giving time 1960. Then you recall on redirect examination I asked "Did you answer all the questions that were given by the Grand Jury?" And he couldn't recall. That's a pretty important thing to remember when you refuse to answer a question, but he couldn't recall that.

[fol. 1033] Then the other point, I said, for example:

Were the checks covered and he said, no, he didn't cover any. The checks weren't presented to him before the Grand Jury. So therefore we didn't know all the answers.

We knew what the rest of the evidence was going to be. We asked Mr. Turner to take a close look at this contract. Did he see Mr. Hufstedler present when he signed that? Oh, yes, I know that. He was going on a trip to Oregon. He signed that. That isn't so, that is a forgery.

Mr. Campbell: I'll object to the statement that that was a forgery.

Mr. Thornton: I will read that from the transcript.

The Court: The jury are instructed to disregard that. The witness said it looked like his signature. No one contended it was his signature.

Mr. Thornton: May I read it?

The Court: He didn't remember signing it. It looked like his signature though. Go ahead and read it.

Mr. Thornton: This is direct examination, page 681:

"Q. Mr. Hufstedler, did you ever hear of the Eagle Pass Music Publications Company?

"A. Yes, sir, I have.

"Q. Who was the operator of that company?
[fol. 1034] "A. Dallas Turner.

"Q. Were you ever a partner of Dallas Turner in the operation of that company?

"A. Absolutely not.

"Q. I want to show you Exhibit 39 marked for identification. Is that your signature at the bottom of that sheet?

"A. I didn't sign this document. This could be my signature or a copy of my signature.

"Q. But you didn't sign it?

"A. No, sir.

Misrepresentation No. 5: "The defendants were negotiating with a publisher that had placed on contract suc-

cessful radio recording and stage personalities." We were referring to his statement, the whole effect of the literature that he planned to negotiate, that he was carrying on. There was one negotiation in February of 1958, and that set the stage for the rest of the proceedings. It wasn't a continual thing. Who were these other active, responsible publishers that he talked to? Not that he ever got a contract with them. The only one we know about, and that's the one we are talking about, is Dallas Turner. There was no future plan.

Contracts were entered into prior to September 18th, the [fol. 1035] date on that exhibit there, but if you will go through them you find this other literature, the correspondence:

"It is my desire to handle it."

As we both understand, and so forth, and then he continued to go out in September of '58—Count 7 and Count 8, September '58.

There are, I think, approximately four or five examples where they went out after the date on the back of the invoice.

Then we talked about that Hominy check. Well, that check wasn't produced that he paid a bill at Hominy. But counsel didn't explain it all or even mention whether or not Stephen Singer placed that order. But it was placed from a motel where Mr. Singer stayed in Los Angeles. That bill doesn't say "stephen" or "mortimer". It just says "Mr. Singer." And the telephone "Axminister 2-" or whatever it is.

Then the position of the defendants that the people got exactly what they asked for, and this was good quality to the records. We are not contesting quality. That's a matter of taste. My personal taste is I like the piano on one song, and maybe on the other song I prefer the Madhatters. It's a question of personal taste. We are saying the inducement, the whole literature considered as a whole, especially your opening literature, misled these people that Ralph Hastings had some standing in the entertainment field, [fol. 1036] that he had some way of getting appearances

for an entertainment group. You remember he was asked the question on cross examination:

"Have you placed many songs with Mr. Turner?"

Mr. Campbell said "many, many," but he said "some." But the question we asked on redirect was "When was that?" "Oh, that was three or four years ago." "Anything to do with Ralph Hastings?" "No."

Counsel stated that the director of recording was Sanford Dickenson. Then the allegation is the arrangers scale of pay, the directors of recordings would be at \$47.50. Mr. Singer's testimony was that all Mr. Dickenson got was \$30.50 for the 78 rpm's. What happened to the rest of that? Royalties?

Leola Thompson, Counts 27 and 28.

We asked Mr. Singer about it. That's the point. The defendant doesn't have to take the stand in a criminal case. If he does take the stand you consider his demeanor and what he produces and what he talks about. He doesn't have to produce his records. But isn't it interesting that those records weren't available, they were in Phoenix?

The Film Tone label. This guide contains record labels. It contains the list of record companies. I don't see any "Film Tone."

Why were these people picked out and not California [fol. 1037] people? When did the government first hear of California people? The last day of the trial. If you examine Exhibit 64 I have tried to put the Los Angeles area at the top, the ones that I thought were in the area. I do not think there are any in the city. Newport Beach, Ontario. Several changes of addresses of military personnel. El Cajon. That's in San Diego. We didn't know about it. How do you find out? You don't have access to their record. How do you know who in California they were mailing to? You select people that you find out about. You find that out through mail or inquiry. "We will contact you."

The letter, Menchaca, after they had him committed to the deal and they offered to refund the money the money wasn't refunded, so Menchaca still bought the record and paid \$94 for the 100 pressings.

Then we gave you all the exhibits we had of these witnesses. We didn't slip one out of a black box for this

witness that would probably impeach the man on a minor point and another one on a different point. We gave you everything we had on these witnesses as related to these companies.

You mean there was no correspondence that criticized the company? I don't even imagine General Electric could claim that.

Then the reference to the business not making money. Was that a gratuitous assumption by counsel? Mr. Singer [fol. 1038] didn't state that. Mr. Singer didn't state that his whole plan was the grandiose thing that eventually one record might hit. He didn't state that. Those questions weren't even asked of him.

How do you tell whether or not it made a profit? You examine the books and records and have an accountant examine them, that's the logical way. So we go with what we have. Mr. Singer testified that approximately 900 to 1,000 people purchased the 78 rpm. That makes 600 to 700 of these that were Madhatter recordings. He stated that \$30.50 went to Mr. Dickenson. That was his salary, and whatever else he could make in it. But he also had to pay the recording studio et cetera. That was his living on that. Whether he made a profit I don't know. \$12.00 for the orchestra arrangement that Mr. Singer thought was additional that he paid. That makes \$42.50 from \$84.50 which leaves \$45.50 times 700 makes \$31,850. He had to pay Rose Zukor and he had to pay rent on a one-room office at Producers Motion Picture Studio, and he had to pay mailing service. How much did that cost? We haven't even covered the Madhatters, or the Ken Starr recordings.

The next point, the 45 rpm's and there were a hundred or so of those. This is a key point: In that opening literature you were not told that the price for you was \$96 but there were going to be three other songs. So it's four times \$96 [fol. 1039] or a total of \$384 that is being paid. And what did Mr. Dickenson get for all of that? Mr. Dickenson was getting \$8 a record. That leaves \$304 to pay the expenses of Rose Zukor and mailing service and rental. And 304 times 100 is approximately 30,400.

We are not including any profit he might make on the Ken Starr recordings.

Now the records of the bank are for 1958 and 1959. There are deposits made only in the first two months of 1959. We don't have the record for 1957. You recall the bank officers stated that they were in storage in Orange County. But the account was opened on July 22nd, 1957, approximately six months in '57. What were the total deposits for 1958? The total deposits for 1958—

Mr. Campbell: That's objected to as not proper argument, if the Court please.

The Court: The bank books are in. You can comment on what they disclose.

Mr. Campbell: But in the absence of any evidence whatsoever as to what those deposits represented—

Mr. Thornton: I am just stating the total of deposits. It's for the jurors to draw whatever inference they want.

The Court: All right.

Mr. Thornton: The total deposits for 1958 were in ex-[fol. 1040] cess of \$75,000. In 1959 they were \$5,040 for two months. We don't know what they were for 1957.

A point was mentioned that this was a cunning type of prosecution. I am a little dumb. I wish people would say all the bad things they want to about me, but don't give me the innuendo. I don't know what you are talking about, because my initials are at the bottom. Any case you cite down there will have my initials on the bottom and the secretary. And at the bottom it was Laughlin E. Waters, and now it will be Mr. Whelan. Is there anything cunning about the U. S. Attorney? Well, sometimes comments like that provoke you to make statements you shouldn't make, so it is better just to shut your mouth, but I do not accept them.

Ladies and gentlemen, there was a very complicated scheme which prevailed throughout the United States, difficult case to gather the evidence on, but in the final analysis I think one of the finest portions of our law is not lawyers to decide whether these people are guilty or not guilty, but it is twelve people like yourself, ordinary people. How do you judge the literature? This case is decided by those four or five main letters that I went through and the circular. Were these people induced into a fraudulent

scheme to invest their money? It is not a question of what the quality of the record was, whether they received royalties. Maybe they wanted it, maybe they would have bought [fol. 1041], it like they bought from Musicmakers if they knew all the facts. But wouldn't you like to know the facts before you spend \$87.50 and \$94? Do you think this was honest, fair dealing? In the ultimate analysis it is lay people like yourself who decide what is criminal fraud, what is going to go through the mail. If this is a legitimate business, no criminal fraud, Mr. Singer ought to get a pat on the back "Go ahead and do likewise. Lots of success." If it is criminal fraud it is your decision to make.

Mr. Campbell: I wish to challenge one statement made by counsel because it also confirms your Honor's recollection, and that has to do with the examination of the witness Hufstedler and his signature.

The Court: Yes.

Mr. Campbell: The testimony goes on.

Mr. Thornton: May I have the page number?

Mr. Campbell: 689.

"Q. Mr. Hufstedler, did you say whether or not that was your signature on that document in front of you?

"A. I don't think it is.

"Q. You say you don't think it is?

"A. No, sir; because I don't ever remember signing a document like that.

"Q. Does it appear to be your signature?

[fol. 1042] "A. It appears to be, yes.

"Q. Will you look at the date of that document?

"Mr. Thornton: The last sentence.

"The Witness: 15th day of July 1958.

"Q. By Mr. Campbell: That is Government's Exhibit—

"The Court: I think the way the question was put it might have misled you. You understand this is a photostat of a document. What you are really asked is, do you remember signing an original like that?

"The Witness: No.

"The Court: You don't?

"The Witness: No, I don't remember signing an original.

"The Court: But the signature looks like yours?"

"The Witness: Yes, sir."

"The Court: Well, is it possible that you signed it and just don't remember it?"

"The Witness: I don't remember signing the document. It is possible, but it is not probable, because I usually remember what I sign."

"The Court: It isn't signed by anybody who put their initials on it. It purports to be your signature?"
[fol. 1043] "The Witness: That's right."

The Court: All right.

[fol. 1044]

SUPREME COURT OF THE UNITED STATES

No. 898—October Term, 1963

MORTIMER SINGER,

Petitioner,

vs.

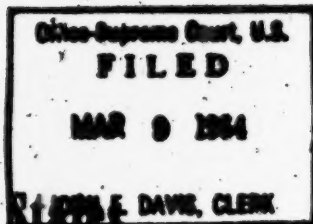
UNITED STATES.

ORDER ALLOWING CERTIORARI—April 20, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.



IN THE
Supreme Court of the United States

October Term, 1963

No. ~~100~~ 42

MORTIMER SINGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit.

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IN THE
Supreme Court of the United States

October Term, 1964

No. _____

MORTIMER SINGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Petition for a Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit.**

*To the Chief Justice of the United States and the
Associate Justices of the Supreme Court of the
United States:*

Your petitioner, Mortimer Singer, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on January 6, 1964.

Opinion Below.

There was no opinion in the District Court. The opinion of the Court of Appeals for the Ninth Circuit was filed on January 6, 1964, has not yet been reported, and is appended hereto at Appendix A., pp. 1 to 6. The judgment of said Court of Appeals is appended hereto and marked Appendix B, p. 7.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 6, 1964 (*infra*, Appendix B, p. 7). A petition for rehearing was denied on February 10, 1964 (*infra*, Appendix C, p. 8). The jurisdiction of this Court is invoked under provisions of 28 U. S. C., Section 1254(1).

Questions* Presented.

1. May the United States of America constitutionally compel the defendant in a felony case to be tried by a jury against his will and against the will of his counsel when the trial judge has expressed his approval of their valid waiver of a jury trial, but the Government refused to consent thereto?
2. Is Rule 23(a) of the Federal Rules of Criminal Procedure constitutionally valid insofar as it limits the right of the defendant to waive a jury trial by requiring the consent of the Government thereto?
3. Did the failure of the trial court to charge the jury on the elements of the offense charged, combined with the other errors in its charge to the jury, constitute a violation of the due process clause of the United States Constitution so that petitioner was denied a fair trial?
4. Did the improper and prejudicial statements and arguments made by the prosecutor constitute a violation of the due process clause of the Constitution so that petitioner was denied a fair trial?
5. Did the Circuit Court err in failing to apply Rule 52(b) of the Federal Rules of Criminal Procedure in order to correct the manifest and seriously prejudicial errors which occurred at the trial even though they were not called to the attention of the trial court?

Constitutional Provisions, Statutes, and Rules of Court Involved.

The constitutional provisions, statutes, and Rules of Court Involved are set out in Appendix D, at pp. 9-10.

Statement of the Case.

Petitioner, Mortimer Singer, was tried and convicted by a jury in the United States District Court, Southern District of California, on twenty-nine counts of an indictment charging thirty separate violations of the Mail Fraud Statute, 18 U. S. C. Section 1341 (Appendix D, p. 11).

Counts One to Seventeen of the indictment charged "depositing" of mail in violation of Title 18 U. S. C. Section 1341, and Counts Eighteen to Thirty charged "receiving" mail in violation of the same statute. The first count of the indictment set forth the nature of the alleged scheme and the remaining counts incorporated the details thereof by reference to Count One. The indictment charged that beginning on or about July 1, 1957 and continuing to on or about March 15, 1959 appellant devised a scheme to defraud and obtain money and property from amateur song writers, lyric writers, and composers, by means of false and fraudulent pretenses, representations and promises. The indictment further alleged that petitioner falsely represented himself as the operator of a legitimate and well established song servicing and marketing business which could, and did, for a service charge, have songs, lyrics, and other musical compositions arranged, orchestrated, edited, published, recorded and exploited for the benefit of amateur song writers.

At the outset of the case, petitioner attempted to waive trial by jury [Opinion of Court below, App. A, p.

2; R. T. Vol. A, p. 11, lines 18-22]. The trial court was willing to approve the waiver [R. T. Vol. A, p. 11, line 23, to p. 12, line 5]. However, the government refused to consent and petitioner was compelled to be tried by a jury against his will [R. T. Vol. A, p. 19, lines 19-21]. . .

Thereafter, in the course of the trial, the Government in its opening statement to the jury improperly presented and detailed other alleged offenses not mentioned in the indictment and made improper arguments which prejudiced the jury. For example, the Government referred to and elaborated upon other alleged offenses involving unrelated persons and entities, namely, James Carlyle Berg, Melody Masters, or Royal Melody Masters, Thomas and Berg Company, and Winston Publishing Company [R. T. p. 22; line 17, to p. 24, line 4]. None of these persons or entities was involved in this case and no evidence concerning them or petitioner's connection with them, if any, was submitted in this case. However, the effect of describing other alleged criminal offenses that were not included in the indictment and were not proved, was highly prejudicial to the petitioner, and designed to cause the jury to believe or infer that the petitioner was involved in many more criminal offenses.

Furthermore, the Government in its opening statement to the jury persisted in making improper arguments and presenting lengthy details as to alleged facts and evidence and witnesses to be used, as well as at-

tempting to instruct the jury on the law, all of which were highly improper and prejudicial [R. T. pp. 10-24 incl.]. Then, the Government persisted in asking improper leading questions and making improper, misleading and prejudicial remarks during the trial (see *infra*). In its closing argument to the jury, the Government argued that a certain partnership agreement constituted a "forgery" [R. T. Vol. B, p. 35, line 9]. There was no legal proof for such a charge [R. T. line 22, to p. 287, line 10]. The Government also persisted in arguing its own meaning of the words "made available" in its closing argument [R. T. Vol. B, p. 10, lines 5-15], despite the fact that the court had ruled during the trial that there was no ambiguity in the agreement requiring interpretation [R. T. p. 233, lines 4 and 5].

The damaging effect of the government's prejudicial misconduct at the trial was further aggravated by the errors of the trial court. The most serious error of the trial court consisted of its failure to give proper instructions to the jury, particularly in failing to define or set forth the necessary elements of the offense charged. The trial court failed to outline all of the separate elements necessary to constitute fraud in connection with the offense charged although the court had stated in chambers that it would do so [R. T. p. 48, line 2, to p. 50, line 2].

The trial court also gave misleading and erroneous instructions concerning circumstantial evidence [R. T.

p. 946, lines 8-10], presumption of innocence [R. T. 951, line 23, to p. 252, line 4], impeachment of a witness who gives false testimony [R. T. p. 944, lines 11-21], and reasonable doubt [R. T. p. 952, lines 9-20]. All of these errors were brought to the attention of the Court of Appeals but that Court refused to consider them because of Rule 30 of the Federal Rules of Criminal Procedure (App. D, p. 10). However, the application of Rule 52(b) of the Federal Rules of Criminal Procedure (App. D, p. 11) was brought to the attention of the Court of Appeals but said Court did not give any consideration to Rule 52(b) or even mention its applicability.

REASONS FOR GRANTING THE WRIT.

I.

Petitioner Was Deprived of His Constitutional and Fundamental Right to Waive a Jury Trial.

First and foremost, petitioner wishes to emphasize that his claim raises a serious and far-reaching constitutional question, which ought to be but never has been decided by this Court. Petitioner claims that his fundamental right to demand a jury trial in a criminal case includes the right to refuse a jury trial and that this basic right can not be abridged by making it dependent upon the consent of the government, for the following reasons:

- (1) Historically and at the Time of the Adoption of the Constitution, the Right of a Defendant to Waive a Jury Trial Was Recognized.

It has been established and recognized in the federal courts that a defendant in a criminal proceeding may waive his constitutional right to a trial by jury. *Patton v. United States* (1930), 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263. Furthermore, the defendant has the right to try his own case without a jury even without the benefit of counsel, *Adams v. United States ex rel. McCann*, 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 268, 143 A. L. R. 435.

The question here presented is whether the constitutional rights of the petitioner were violated when his request to waive a jury trial was denied because the government refused to consent to such waiver.

It is important to note that at early English common law the accused could refuse a jury trial even though the government sought to compel him to submit

to a jury trial by using various means, including torture. Later development of the jury system was such that it became a protection of the accused against government oppression and thus the accused's right to a jury trial was adopted in our Constitution, because of the benefits to the accused.

The case of *Patton v. United States*, 281 U. S. 276, clearly recognizes the right of an accused to waive a trial by jury and comprehensively disposes of all the arguments used against such waiver. The court states as follows at page 298: "*Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement* (Emphasis added).

In the *Patton* case, the court cites with approval the references in the brief of government counsel showing that waiver of trial by jury, even in trials for serious offenses, was permitted in Colonial times and at the time of the adoption of the Constitution, *Patton v. United States*, 281 U. S. 276 at pages 281-282 at page 297, the court further states, as follows: ". . . it is reasonable to conclude that the framers of the constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused" (Emphasis added).

Amendment VI of the United States Constitution provides, in part, as follows: ". . . the accused shall enjoy the right to . . . trial by an impartial jury . . ."

In construing the Constitution and particularly the Bill of Rights, it must be remembered that they were designed to protect the rights of the people and did not create these rights. They are based upon the concept that the people are endowed with certain inalienable rights which include the rights to “. . . life, liberty, and the pursuit of happiness . . .” [Declaration of Independence] and that these rights existed before the Constitution was written.

This Court has held that there is “. . . nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury, even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer”, *Adams v. United States ex rel. McCann*, 317 U. S. 269, 275, 63 S. Ct. 236, 87 L. Ed. 268 (1942).

Unfortunately, the well-reasoned opinion of the court in the *Patton* case, *supra*, becomes confused by the *obiter dicta* at the end thereof, where the court added gratuitously that the approval of the court and the consent of the government counsel would be required. We respectfully submit that this latter portion of the opinion is without any legal or historical basis and is inconsistent with the rest of the opinion. It appears to be an afterthought without supporting authority. What good is the accused's right to waive a jury trial if the government counsel, who is doing his utmost to convict the accused, can thwart the efforts of the accused and his counsel? Does this not “convert a privilege of the accused into an imperative requirement” which the court had stated could not be done?

The whole purpose of these constitutional provisions is to protect the accused, particularly against oppression

by the government. It is therefore arbitrary, unreasonable, and a deprivation of his constitutional rights to compel him to have a jury trial against his wishes, just because the government insists upon it. As the court, through Justice Frankfurter, stated in *Adams v. United States ex rel. McCann*, 317 U. S. 269, at page 279: "*What were contrived as protection for the accused should not be turned into fetters*" (Emphasis added).

(2) **The Right of an Accused in a Criminal Case to Demand a Jury Trial Necessarily Includes the Right to Refuse a Jury Trial.**

As we have heretofore shown, historically this right to waive a jury trial was recognized, and logically in drawing the Constitution there was no more need or reason to add words recognizing the right to waive a jury than it was necessary to add such words of waiver to any other constitutional right. The right to demand necessarily implies the right to refuse; *People v. Spegal* (Ill. Sup. Ct. 1955), 5 Ill. 2d 211, 218; *People v. Fisher*, 340 Ill. 250, 257, 172 N. E. 722 (1930). As the court stated in *People v. Spegal*, 5 Ill. 2d 211 at p. 218, "*The power to waive follows the existence of the right, and there is no necessity of guaranteeing the right to waive a jury trial*". Also, this is the view in the *Patton* case expressed as follows: "*To deny his power to do so, is to convert a privilege into an imperative requirement.*" *Patton v. United States*, 281 U. S. 276, 298.

- (3) Since a Defendant Can Plead Guilty and Waive Any Trial Whatever Without the Consent of the Government, He Must Necessarily Have the Right to Waive a Trial by Jury Without Government Consent.

This proposition is supported by *State ex rel. Warner v. Baer* (1921), 103 Ohio St. 585, 589, which is cited with approval in *Patton v. United States*, 281 U. S. 276 at p. 291. Many courts have recognized the constitutional right of an accused to waive a trial by jury.

Munsell v. People, 122 Colo. 420, 222 P. 2d 615;

State v. Hernandez, 46 N. M. 134, 123 P. 2d 387;

State v. Harvey, 117 Oregon 466, 242 Pac. 440, 444;

Commonwealth v. Petrillo, 340 Pa. 33, 16 A. 2d 50;

People v. Scuderi (1936), 363 Ill. 84, 1 N. E. 2d 225, 227;

State v. Zebrocki (1935), 194 Minn. 346, 260 N. W. 507, 508;

State ex rel. Warner v. Baer, 103 Ohio State 585, 612 (1921).

- (4) Since a Defendant Can Waive Other Important Constitutional Rights Without the Consent of the Government, He Must Necessarily Have the Right to Waive a Jury Trial Without Government Consent.

It has been held that the defendant may waive other important constitutional provisions such as confrontation of witnesses and assistance of counsel without Government consent. Accordingly, there is no valid basis for restricting the defendant's right to waive a

jury trial since the power to waive follows the existence of the right itself, *People v. Spegal* (Ill. Sup. Ct. 1955), 5 Ill. 2d 211, 218, 125 N. E. 2d 468, 51 A. L. R. 2d 1337.

It has been held that there is "nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury" *Adams v. United States ex rel. McCann*, 317 U. S. 269, 275, 63 S. Ct. 236, 87 L. Ed. 268 (1942); *Naples v. United States*, 307 F. 2d 618, 625, 626 (D. C. 1962).

(5) The Constitutional Provisions in Respect to Jury Trials Are for the Protection of the Interests of the Accused and Not the Government; There Is Nothing in the Constitution Giving the Government the Right to Demand a Jury Trial.

As the court states in the *Patton* case, ". . . it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused", *Patton v. United States*, 281 U. S. 276 at p. 297. It is also stated that, "The right to trial by jury was uniformly regarded as a valuable privilege bestowed upon a person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court", *Patton v. United States*, 281 U. S. 276, 296.

Thus, to require the consent of the Government before defendant can waive a jury trial in effect destroys the defendant's right and gives the Government a right to demand a jury trial. This has been held in the

case of *People v. Spegal*, 5 Ill. 2d 211, where the court states at page 218, as follows:

" . . . that the prosecution's consent is necessary to make such a waiver effective is inconsistent with the defendant's acknowledged power, enables the state to nullify his act and reduces his power to waive a jury trial to a shadow . . . The power to waive follows the existence of the right and there is no necessity of guaranteeing the right to waive a jury trial."

The case of *People v. Spegal* (*supra*) overrules *People v. Scornavache*, 347 Ill. 403, which was contrary. A sharp criticism of the *Scornavache* case and arguments for the unfettered right of an accused to waive a jury trial are set forth in an article by Jerome Hall in *18 Am Bar. Assn. Journal*, 226 entitled "*Has the State a Right to Trial by Jury in Criminal Cases.*"

Furthermore, it has been held in the Federal Court that where right to a jury trial exists in petty offenses, the consent of the Government is not necessary to effect a waiver: *United States v. Au Young* (1946), 142 Fed. Supp. 666. There is all the more reason to recognize the defendant's right to waive a jury trial in more serious offenses.

We respectfully submit that any attempt to give a right, directly or indirectly, to the Government to demand a jury trial in a criminal case, would be in violation of petitioner's rights under *Amendments 9 and 10 of the Constitution*, (App. D, pp. 9-10). In construing and applying *Amendment 9* to this case, the fact that the framers of the Constitution did not deem it necessary to state that an accused could also waive

his right to a jury, would not disparage such right. Every accused had an inalienable right to demand or refuse trial by jury before the adoption of the Constitution. Therefore, the failure to specify such right does not abrogate such right. Also *Amendment 10* specifies that all rights were reserved to the people except such as were specifically delegated to the United States or to the States. Thus, it is clear that the Government has no right to demand a jury trial in a criminal case or to deprive petitioner of his right to waive a jury trial.

- (6) **The Defendant Has a Right to Safeguard Himself Against Oppression or Partiality of a Jury and to Decide What Is Best for Himself.**

It has been recognized that there are occasions when a jury might be influenced by passion, prejudice, or public feeling, or lack sufficient knowledge, experience or insight to give the defendant a fair trial. Often, the subject matter may be too technical or too involved for a jury. This has been aptly expressed as follows:

"Clearly this right is for the benefit of the accused. If he regards it in the particular case as a burden, a hardship, a prejudice to a fair trial, why in the name of reason should he not be permitted to waive it and submit his cause to the magistrate. The local atmosphere with which the jurors are more or less impregnated may not in his judgment have reached the magistrate. He may have the highest confidence in his sense of fairness and justice in determining the facts of his cause, and *what was given to him generally, as a shield, should not be used as a sword* in case he feels that a jury

trial in such case would so result." *Hoffman v. State*, 98 Ohio St. 137, 146-147 (1918). (Emphasis added.)

The right of the defendant is further expressed in the following opinion:

"The right of an accused person to a jury trial is absolute to the extent that he may have such a trial by claiming it or even by withholding his consent to proceed without it. The State owes to a person charged with a crime a fair and impartial trial, including a strict compliance with every constitutional guaranty, *but it is not obliged to force upon him the acceptance of rights and privileges in the face of his desire, informed and expressed, to waive them.*" *People v. Fisher*, 340 Ill. 250, 257, 172 N. E. 722 (1930). (Emphasis added.)

The basic question is, should not the defendant have the right to make the ultimate decision as to demand or waiver of a jury trial. This view is held by Justice Frankfurter who stated the following in *Adams v. United States ex rel., McCann*, 317 U. S. 269, 63 S. Ct. 236 at p. 241: "*And since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury*", and at page 242, the court goes on to state: "*What were contrived as protections for the accused should not be turned into fetters.*" In that case, the defendant did not even have counsel when he waived the jury. Certainly, this principle would apply all the more where the accused through capable counsel requests a waiver of jury trial.

- (7) To Compel a Defendant in a Criminal Case to Undergo a Jury Trial Against His Will Is Contrary to His Rights to a Fair Trial and the Provisions of the Constitution.

The Fifth Amendment to the Constitution provides, in part, as follows: (App. D, p. 9):

"No person . . . shall be deprived of life, liberty, or property, without due process of law."

It is our contention that where the defendant is compelled to undergo a jury trial against his will and against the will of his counsel, when the trial judge has expressed his approval of their decision to waive a jury trial, and only because the government refused to consent thereto, there is a violation of the "due process clause" of the Fifth Amendment as well as of other constitutional provisions.

This provision protects the right of a defendant to a fair hearing, *Wong Yang Sung v. McGrath*, 339 U. S. 33, 50. It supplements the procedural guarantees in the Sixth Amendment and in the preceding clauses of the Fifth Amendment for the protection of persons accused of crime, *Constitution of the United States*, Senate Document No. 170 (1953 Ed.), p. 847.

The case of *Gideon v. Wainwright*, 372 U. S. 335, 339, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), emphasizes that, ". . . due process is a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," and that the due process clause relates to the concept of the accused having a fair trial and the protection of the fundamental rights of an accused. It is further held that due process, ". . . in safeguarding the liberty of the citizen against deprivation through the action

of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney v. Holohan*, 294 U. S. 103, 112 (emphasis added).

Therefore, in applying the test of due process to this case, we submit that since the petitioner had a right to waive a jury trial, it became a mockery to make this right dependent upon the consent of the government, and his constitutional rights were thereby violated.

II.

Rule 23(a) of the Federal Rules of Criminal Procedure Is Constitutionally Invalid Particularly Insofar as It Limits the Right of the Defendant to Waive a Trial by Jury by Requiring the Consent of the Government Thereto.

The constitutionality of Rule 23(a) of the Federal Rules of Criminal Procedure (App. D, p. 10) is a matter of far-reaching importance and applies to practically all federal criminal cases. It involves serious and far-reaching constitutional questions which ought to be, but never have been decided by this Court.

Nowhere in the Constitution is the Government given the right to demand a jury trial in a criminal case. Yet by Rule 23(a) the Government, in effect, exercises the right to demand a jury trial and to compel the defendant to undergo a jury trial against his will. We can find no historical, legal or logical basis for giving the Government such a right. Since Rule 23(a) operates to abridge the defendant's right to waive a jury trial, it violates his constitutional rights under the Fifth, Sixth, Ninth and Tenth Amendments heretofore cited.

The learned opinion of the Court of Appeals in this case (App. A, p. 3) acknowledges that petitioner's "logic is not lacking some persuasive quality" in urging the unconstitutionality of Rule 23(a) against him. The admitted logic of appellant's position is then said to yield to "well settled" authority exemplified by three cited cases. Careful analysis of each of these cases discloses that none of them settles this highly important constitutional issue well, or at all. *Patton v. United States* (1930), 281 U. S. 276, the only decision of higher authority cited in the Court's learned opinion or by the government in support of Rule 23(a), was a case in which the government *stipulated* with the defense that a felony trial should continue with eleven instead of the original twelve jurors. The stipulated jury of eleven convicted the defendant, and the United States Supreme Court affirmed. As a matter of fact, the opinion in the *Patton* case comprehensively supports the arguments in favor of petitioner's right to waive a jury trial. The only portion adverse is the *obiter dicta* at the end of its opinion which cites no authority and has no valid basis and does not settle the issues before this Court.

Taylor v. United States (9th Cir. 1944), 142 F. 2d 808, cert. den., 323 U. S. 723, reh. den. 323 U. S. 813, the second authority cited by the Court in support of Rule 23(a) is another case in which the government stipulated with the defendant to continue trial with eleven jurors. The right of a defendant to waive the jury entirely, with the approval of the trial judge, over the government's objection was neither involved in the *Taylor* case, nor decided by it.

Mason v. United States (10th Cir. 1957), 250 F. 2d 704, the third and last decision cited in the learned opinion, was a case in which the trial *judge*, and not the prosecutor, insisted upon trial by jury, and refused to approve the defendant's election to be tried by the Court alone. The prosecutor's consent or refusal was never put in issue; the government's position in the matter is not even mentioned in the opinion; and, accordingly, the point with which we are concerned was in no wise involved or decided.

Thus, of the three cases cited by the learned Court in the case at bar, two involve a stipulation by prosecution and defense to a jury trial of eleven, and one involves a refusal by the trial *judge*, to approve a non-jury trial. None of the three cases cited involves or decides that the government may constitutionally force (1) the defendant, (2) his counsel and (3) the trial court to bow in unison to the will, whim or motive, whatever it might be, of the prosecutor in choosing or waiving a jury, as was done here.

Writers on the law, who have considered the point, have denounced the Rule 23(a) requirement of consent by the prosecutor as procedurally unconstitutional:

"While the rule requires the consent of the Government to a waiver of a jury trial, as far as the author is aware, the Government has ordinarily considered giving such consent a pro forma routine matter and has generally granted it as of course without discussion. Obviously the prosecution should be interested only in seeing that justice

is done and should have no interest in the choice of the mode of trial. A prosecuting attorney should not be a partisan advocate representing a client. He is an officer whose function is to assist in attaining a just result, whether it be a conviction or an acquittal. Many years ago an eminent Solicitor General of the United States observed that 'the Government always wins a case when justice is done to one of its citizens.'

"After all the right to trial by jury is a constitutional right of the defendant alone. It is intended to be a privilege of the accused. The prosecution has no constitutional right to a trial by jury, and the requirement that it give its consent to a waiver is a purely procedural rule and has always been regarded as such.

"The author urges that Rule 23(a) of the Federal Rules of Criminal Procedure be amended by striking out the requirement of a consent of the Government to a waiver of a jury trial."

"A Criminal Case in the Federal Courts" by Alexander Holzoff, cited in the West Publishing Co. edition of the 1960 *Federal Rules of Criminal Procedure*, pp. 17-18.*

Another writer puts the matter this way:

"Author's* Note to Rule 23: This [Rule 23(a)] appears to state the present law with respect to the right to trial by jury in criminal cases. I could never understand why a defendant should be required to secure the consent of the court and the

*The author is a United States District Judge for the District of Columbia and former Chairman of the Section of Judicial Administration of the American Bar Association.

prosecutor. The effect of this rule is that either the court or the prosecutor can force a jury on him when he does not want it. There is an argument in favor of the court where the death penalty is involved and the court prefers to be excused, but that is subject to debate. In cases involving public passions and prejudices a judge is in danger of an unpopular decision. All of these matters occur to me in considering the position of the judge, but where is the prosecutor entitled to a vote? He will insist on a jury when he believes that the prosecution will have an advantage. I never heard of the battle in which the prosecutor won the right to a jury trial."

Federal Rules of Criminal Procedure by Wm. Scott Stewart; copyright 1945; Publisher: The Flood Company, Chicago, Ill.

It is likewise significant that the Advisory Committee on Criminal Rules appointed by the Chief Justice of the United States pursuant to *Public Law 85-513; 72 Stat. 356; 28 N.S.C.A. 331*, enacted July 11, 1958, has been considering the very point at issue here.

The federal courts have the power as well as the duty to declare invalid federal rules of procedure which are unconstitutional and should do so in this case.

Rule 23(a) is also invalid on another ground. Although the Supreme Court has been given the power to prescribe rules of pleading, practice, and procedure, it has no power to change the *substantive rights* of a defendant, *Baker v. United States* (1944), 139 F. 2d 721 (C. C. A. 8th); *Mississippi Publishing Corp. v.*

Murphree (1946), 326 U. S. 438; *United States v. Sherwood* (1940), 312 U. S. 584.

This principle is set forth in *Federal Criminal Practice Under the Federal Rules of Criminal Procedure*, by William M. Whitman at page 6, as follows:

“However, the (Federal Rules of Criminal Procedure) govern practice and procedure only; the authority of the Supreme Court to prescribe rules of procedure does not empower the court by a procedural rule to deprive a person of a substantive right granted by law.”

We respectfully submit that the right to waive a jury trial in a criminal case is a substantive right which can not be abridged by rule of court.

III.

Petitioner Was Denied a Fair Trial as Guaranteed Under the Fifth Amendment in That His Conviction Rests Upon Instructions to the Jury Which Were Incorrect, Prejudicial, and Misleading and in the Failure of the Jury to Receive Other Necessary and Proper Instructions.

The trial court stated in chambers that in charging the jury it would rely upon the elements of fraud set out in the cases of *Southern Development v. Silva*, 125 U. S. 247 and *Oppenheimer v. Clunie*, 142 Cal. 313, 318 [R. T. p. 48, line 2, to p. 50, line 2] and the trial court further stated in chambers as follows: “And while damage is not necessary in a criminal fraud the other elements are still necessary” [R. T. p. 50, lines 3 and 4]. However, the trial court in its instructions failed to give a complete definition of fraud. This was clearly error, *Bird v. U. S.*, 180 U. S. 356, 45 L. Ed.

570, 21 S. Ct. 403. It was basic and all important that the jury should know and understand all of the separate elements necessary to constitute fraud, and evaluate each one in connection with the offenses charged. The court failed to outline to the jury the following elements required to prove fraud:

(a) That the defendant has made a representation in regard to a material fact.

(b) That such representation was false.

(c) That such representation was not actually believed by defendant on reasonable grounds to be true.

(d) That it was made with intent to be acted on.

(e) That the complainant relied on such representation.

(f) That in so acting, the complainant was ignorant of its falsity, and reasonably believed it to be true.

In instructing the jury on the weight and effect of circumstantial evidence in the case at bar, the court stated,

"If the circumstantial evidence measures up to all the foregoing requirements, it is the duty of the jury to return a verdict of guilty" (Emphasis added). [R. T. p. 946, lines 8-10].

This was misleading and erroneous since not only the *circumstantial evidence* but *all of the evidence* must measure up to the requirements to show guilt beyond a reasonable doubt as well as meet the other requirements mentioned by the court [R. T. p. 946, lines 1-7]. *George v. Los Angeles R. Co.*, 126 Cal. 357, 58 Pac. 819. It is reversible error to instruct the jury that it is their duty to bring in a verdict of guilty. It was further erroneous to give circumstantial evidence more weight

or even the same weight as direct evidence, 53 *Am. Jur.* 572; *State v. Alliance*, 330 Mo. 773, 51 S. W. 2d 51, 85 A. L. R. 471.

The Court's instruction concerning the impeachment of a witness who gives false testimony, that *all* of the testimony of such a witness *must* be rejected when he has testified falsely [R. T. p. 944, lines 11-21] is erroneous since the rule still permits a juror to *accept* other testimony of a witness who has wilfully sworn falsely regarding a material fact, if, in spite of merited suspicion on the part of the juror, *he still believes* the balance of the testimony to be true, *People v. Kennedy* (1937), 21 Cal. App. 2d 185, 201, 69 P. 2d 224. It has been held that it would be an invasion of the province of the jury to instruct them that they "must" or "should" disregard the testimony of a witness testifying falsely, 53 *Am. Jur.* 583, note 1; *Com. v. Ieradi*, 216 Pa. 87, 64 Atl. 889.

The defendant is entitled to an instruction defining the law applicable to his theory of the case covering his defense, if there is any competent evidence reasonably tending to substantiate that theory, 53 *Am. Jur.* 501, note 7; *Little v. U. S.* (C. C. A. 10th), 73 F. 2d 861, 867; *People v. Dole*, 122 Cal. 486, 55 Pac. 581.

Honest belief in the representations being made is a good defense, *Rudd v. U. S.* (C. C. A. 6th), 173 Fed. 912.

We respectfully submit that the foregoing constituted a violation of petitioner's constitutional rights under the due process clause of Amendment 5.

IV.

Petitioner Was Denied a Fair Trial as Guaranteed by the Constitution by Reason of the Improper and Prejudicial Statements, Arguments and Conduct of the Government.

It is reversible error for the prosecutor in his opening statement to refer to incompetent or irrelevant matters especially if they are prejudicial. *State v. Peters*, 82 R. I. 292, 107 A. 2d 428, 48 A. L. R. 2d 999; *People v. Fleming*, 166 Cal. 357, 379, 136 Pac. 291.

The Government's attorney in his opening statement referred to other alleged offenses involving other persons and entities to wit, James Carlyle Berg, Melody Masters or Royal Melody Masters, Thomas and Berg Company, and Winston Publishing Company [R. T. p. 22, line 17, to p. 24, line 4]. None of these persons or entities was involved in this case and no evidence concerning them or the appellant's connection with them was submitted in this case. However, the effect of setting forth other alleged criminal offenses that were not included in the indictment and were not proved, was highly prejudicial to the appellant and caused the jury to believe that the appellant was involved in many more criminal offenses.

Furthermore, the prosecutor in his opening statement to the jury persisted in making improper arguments and presenting lengthy details as to alleged facts and evidence and witnesses to be used as well as attempting to instruct the jury on the law, all of which were highly improper and prejudicial [R. T. pp. 10-24 incl.].

It has been held that it is improper to use the opening statement to embody or convey proof by means of unsworn facts or to argue facts or to discuss the

law of the case, 53 *Am. Jur.* 358; *Scripps v. Reilly*, 35 Mich. 371; *Wells v. Ann Arbor R. Co.*, 184 Mich. 1, 150 N. W. 340.

During the course of the trial, the government's attorney persisted in asking improper questions and making statements which were improper, misleading and prejudicial so that defendant was deprived of a fair trial.

The standard of conduct and the duties imposed upon the prosecutor in a criminal case are set forth in *Viereck v. U. S.*, 318 U. S. 236, 63 S. Ct. 561, 566 (1943) where the court held that the appeal to passion and prejudice by the prosecuting attorney in his closing argument was ". . . offensive to the dignity and good order with which all proceedings in court should be conducted" (p. 566). The court goes on to state the rule as follows at page 566:

"We think that the trial judge should have stopped counsel's discourse without waiting for an objection. The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods

calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one! *Berger v. United States*, 295 U. S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 314. Compare *New York Central R. Co. v. Johnson*, 279 U.S. 310, 316, 318, 49 S. Ct. 300, 302, 303, 73 L. Ed. 706."

It has been held that it is improper and prejudicial for the prosecutor to ask a question to which he expects a negative answer and then fail to offer evidence in support of his contention, *People v. Perez*, 23 Cal. Rptr. 569, 574, 575, 373 P. 2d 617 where the court states at page 575:

"The jury have a right to believe that the District Attorney is in good faith and probably had a hidden source of information."

It is improper and prejudicial for the prosecutor to make statements of alleged fact in the guise of questions propounded to witnesses; *Berger v. U. S.*, 295 U. S. 78, 79 L. Ed. 1314, 55 S. Ct. 629.

The conduct of the prosecuting attorney provoked the trial court to state the following:

"The Court: I have warned the jury to disregard it. Counsel doesn't know the rules of evidence. I think between now and the next case he ought to do a little homework and learn the rules of evidence in criminal cases. I am sincere, and I think it is my duty to warn the jury, because you are doing a lot of things that shouldn't be done by a prosecutor. You make statements of what you intend to prove when I have sustained the objection, which is wrong" [R. T. p. 566, line 21, to p. 567, line 16].

In his closing argument to the jury the government's attorney made improper and prejudicial remarks. He argued that one of the documents was a "forgery" and he argued to the jury, "That isn't so, that is a forgery" [R. T. Vol. B, p. 35, line 9]. There was no legal proof for such a charge [R. T. p. 284, line 22, to p. 287, line 10]. This remark was highly prejudicial and improper and constituted reversible error, *Viereck v. United States*, 318 U. S. 236, 63 S. Ct. 561, 566.

The prosecutor continued his tactic of trying to read into the oral and written evidence his own terms and conditions, interpretations, meanings, and innuendoes, and to have the jury infer wrongful and sinister meanings in every word and act [R. T. Vol. B, p. 10, lines 5-15; p. 16, lines 17-25; p. 18, lines 8 and 9, 23; p. 19, lines 4-7; p. 20, lines 3-7; p. 21, lines 16-19; p. 22, lines 17 and 18; p. 27, lines 11 and 12, 16-20]. Likewise, the prosecutor persisted in arguing matters which had been ruled out by the court, all of which were highly prejudicial and which necessarily influenced the jury. Another example is shown where the prosecutor argues that appellant had an interest in Eagle Pass Music Publications despite the fact that the entire ownership was shown to be otherwise [R. T. p. 266, lines 1-22; p. 278, lines 11-16; p. 562, line 13, to p. 563, line 13].

The prosecutor in his opening argument to the jury also referred to matters not in evidence and to some which were specifically disallowed by the court [R. T. Vol. B, p. 9, lines 16-19]. This was highly improper *Scripps v. Reilly*, 35 Mich. 371, 387; *Wells v. Ann Arbor R. Co.*, 184 Mich. 1, 150 N. W. 340, 344. Again, the prosecutor improperly argues that the jury *must*

draw certain inferences which he wanted them to draw [R. T. Vol. B, p. 30, line 8].

We respectfully submit that the prejudicial misconduct of the Government's attorney was such as to constitute a violation of due process and of petitioner's right to a fair trial.

V.

The Learned Court Below Erred in Failing to Apply Rule 52(b) of the Federal Rules of Criminal Procedure in Order to Correct the Manifest and Seriously Prejudicial Errors Which Occurred at the Trial Even Though They Were Not Called to the Attention of the Trial Court.

The pitfalls, perils and dangers of trying any case before a jury are well-known to every trial lawyer, judge and justice. Trial by jury differs not merely in degree but in kind from trial by the court alone.

"The less rigorous enforcement of the rules of evidence, the greater informality in trial procedure—these are not the only advantages that the absence of a jury may afford to a layman who prefers to make his own defense. In a variety of subtle ways trial by jury may be restrictive of a layman's opportunities to present his case as freely as he wishes. And since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury." *Adams v. United States ex rel., McCann* (1942). 317 U. S. 269, 278.

The petitioner here and his trial counsel, with the approval of the trial judge, chose a court trial; but the

prosecutor decided that the case should be tried before a jury. To say the least, this unconstitutional arrogation of power by the prosecutor carried with it a high and grave duty of scrupulous regard on his part for the niceties of procedural fair play. Since nobody but the prosecutor wanted the jury, his was the solemn burden of insuring that he did not abuse the privilege which he had wrested from the petitioner, and his counsel, of choosing the trier of fact.

The opinion of the court below refers to "situations where government counsel may have been guilty of improper examination or argument in the presence of the jury," as well as "numerous examples of alleged misconduct on the part of government counsel" and "alleged failure by the court to give adequate instructions on the elements of criminal fraud." However, the response of the court below to these specifications of obvious prejudicial error, which cannot be made to disappear simply by denying their existence, is that 1) the petitioner failed to make timely objections, and 2) that the jury was duly admonished.

However, the need to make timely, pointed, legally sound and valid objections to prejudicial misconduct before the jury was thrust upon the petitioner against his will by the prosecutor himself. The petitioner did not ask for the jury and he did not invite or commit the prejudicial error with which the record abounds. Having forced the jury upon the petitioner, the prosecution then indulges in an opening recitation of other alleged offenses which were entirely extraneous and unproven, accused the petitioner in his closing argument of "forgery" with which he was not charged and which was unproven, admittedly failed to present an adequate

instruction on mail fraud to the trial judge who accordingly did not define for the jury the elements of the crime, and generally played upon the passions and prejudices of the jury. Now the prosecution sits back after the petitioner has been convicted and challenges him to pin-point a technically sound and timely objection to each and every error, or succumb. This is exactly the contest which the petitioner sought to avoid by waiving a jury; this is exactly what the prosecution had no constitutional right to impose upon the petitioner; this is a classical denial of due process.

The second response to petitioner's specifications of prejudicial error is that the trial judge duly admonished the jury. Aside from the point that petitioner constitutionally attempted, with the approval of the trial judge, to avoid a trial by jury, where admonitions would not be at all necessary, it is crystal clear that judicial admonitions are no match for the subtle and hidden but immensely powerful forces of mass psychology. These forces can no more be controlled by admonitions than could the sea by King Canute. These forces were called into play, and played upon with error, by the prosecution over the constitutional objection of the defense. This was a denial of due process beyond the corrective reach of any admonition.

The learned court below failed to consider the application of Rule 52(b) of the Federal Rules of Criminal Procedure which provides that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court" (App. D, p. 11).

It has been held that prejudicial statements made by the prosecuting attorney in his argument to the jury

constitute reversible error even though no objection was made at the trial, *Brown v. United States* (9th Cir. 1963), 314 F. 2d 293; *Ginsberg v. United States* (5th Cir. 1958), 257 F. 2d 950; *Wagner v. United States* (5th Cir. 1959), 263 F. 2d 877. Likewise, errors in instructions will be noticed even though no objection was made at the trial, *United States v. Raub* (7th Cir. 1949), 177 F. 2d 312, *Herzog v. United States* (9th Cir. 1956), 235 F. 2d 664.

None of these authorities is mentioned in the opinion of the court below and there is no discussion whatsoever of Rule 52(b) by the court below.

The court below merely referred to the absence of objections by the petitioner as a ground for denying him relief on appeal, citing Rule 30 and the 1955 *Brown* case.*

In view of the foregoing, it would appear that there is a conflict between the decision of the Court of Appeals in the case at bar and those decisions of other circuit courts cited above, including prior decisions of said Ninth Circuit Court itself concerning the application of Rule 52(b). However, the cases cited by petitioner which invoke Rule 52(b) clearly entitle him at the very least to a careful consideration of its applicable effect here. Thus, in *Herzog v. United States* (9th Cir. 1956), 235 F. 2d 664 at 666 this court said:

"Criminal Rule 30 by its terms precludes a party from assigning as error the giving of an instruction to which he has not objected on the trial. Rule

*The case of *Brown v. United States* (9th Cir. 1955), 222 F. 2d 293 cited in the Court's opinion is a different case from *Brown v. United States* (9th Cir. 1963), 314 F. 2d 293 cited by petitioner.

52(b), appearing under the caption 'General Provisions,' is not directed to the party, but is a grant of authority to the court itself. These rules are not conflicting. Rather, they complement each other. Rule 52(b) was doubtless designed to take care of unusual or extraordinary situations where, to prevent a miscarriage of justice or to preserve the integrity of judicial proceedings, the courts are broadly empowered to notice error of their own motion. The Rule is in the nature of an anchor to windward. It is a species of safety provision the precise scope of which was left undefined. Its application to any given situation must in the final analysis be left to the good sense and experience of the judges.

"Subsequent to the adoption of the criminal rules many of the circuits have noticed asserted error in instructions not objected to below. See cases cited in the footnote."

In *United States v. Raub* (7th Cir. 1949), 177 F. 2d 312, where a conviction for income tax evasion was reversed for improper instructions, the Court of Appeals said at page 315:

"It appears to be generally established now that —Rule 30 notwithstanding, in criminal cases involving life or liberty of a defendant, an appellate court may notice plain and seriously prejudicial error in the instructions, even though it was not called to the attention of the trial court."

In *Cinsberg v. United States* (5th Cir. 1958), 257 F. 2d 950 at page 955 the court stated:

"... authority is not wanting for enforcement of the fundamental rules of fairness even when no exception is taken to the argument.

"We hold that this statement of the prosecuting attorney constituted 'plain errors . . . affecting substantial rights' under Rule 52(b), 18 U.S.C.A., governing criminal procedure. It was such an error, also, as would have been magnified in its influence on the jury by an objection and motion for mistrial. It made it so unlikely that the petitioner could be given a fair trial, as the term is understood in our jurisprudence, that we hold it to be reversible error."

Petitioner respectfully and sincerely urges that under all of the circumstances it was reversible error for the court below to disregard and to fail to apply Rule 52(b) of the Federal Rules of Criminal Procedure and that, in any event, there is a conflict in the decision of the court below concerning Rule 52(b) with the decisions of the fifth circuit and seventh circuit as well as the ninth circuit court itself, which should be resolved by this court.

Conclusion.

For the foregoing reasons, it appears that the petitioner was deprived of his constitutional right to waive a jury trial, that under all of the circumstances he did not have a fair trial and that he was thereby deprived of his constitutional rights therein. It further appears that the validity and constitutionality of Rule 23(a) and the interpretation and application of Rule 52(b) of the Federal Rules of Criminal Procedure have not been but should be settled by this Court. It further appears that the Court of Appeals for the Ninth Circuit has rendered a decision in conflict with the decisions of other Courts of Appeal as well as in conflict with its own prior decisions.

In view of the importance of the constitutional questions to be decided, including the basic constitutional right of a defendant to waive a jury trial particularly with reference to all federal felony cases, it is respectfully submitted that the writ of certiorari sought herein should be granted.

Respectfully submitted,

SIDNEY DORFMAN,

Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth
Circuit.

Mortimer Singer, Appellant, vs. United States of
America, Respondent. No. 18,284.

Jan. 6, 1964.

On appeal from the United States District Court for
the Southern District of California, Central Division.

Before: Barnes and Merrill, Circuit Judges; and
Burke, District Judge.

Burke, District Judge:

Appellant, Mortimer Singer, was tried and convicted
by a jury in the United States District Court, Southern
District of California, on twenty-nine counts of an in-
dictment charging thirty separate violations of the Mail
Fraud Statute, 18 U.S.C. §1341.¹

¹18 U.S.C. §1341 provides:

"Frauds and swindles

"Whoever, having devised or intending to devise any scheme
or artifice to defraud, or for obtaining money or property by
means of false or fraudulent pretenses, representations, or
promises, or to sell, dispose of, loan, exchange, alter, give
away, distribute, supply, or furnish or procure for unlawful
use any counterfeit or spurious coin, obligation, security, or
other article, or anything represented to be or intimated or
held out to be such counterfeit or spurious article, for the
purpose of executing such scheme or artifice or attempting so
to do, places in any post office or authorized depository for
mail matter, any matter or thing whatever to be sent or
delivered by the Post Office Department, or takes or receives
therefrom, any such matter or thing, or knowingly causes to
be delivered by mail according to the direction thereon, or at
the place at which it is directed to be delivered by the person
to whom it is addressed, any such matter or thing, shall be
fined not more than \$1,000 or imprisoned not more than five
years, or both . . ."

Counts One to Seventeen of the indictment charged "depositing" of mail in violation of Title 18 U.S.C. §1341, and counts Eighteen to Thirty charged "receiving" mail in violation of the same statute. The first count of the indictment set forth the nature of the alleged scheme and the remaining counts incorporated the details thereof by reference to Count One. The indictment charged that beginning on or about July 1st, 1957 and continuing to on or about March 15th, 1959 appellant devised a scheme to defraud and obtain money and property from amateur song writers, lyric writers and composers by means of false and fraudulent pretenses, representations and promises. The indictment further alleged that appellant falsely represented himself as the operator of a legitimate and well established song servicing and marketing business which could, and did, for a service charge have songs, lyrics and other musical compositions arranged, orchestrated, edited, published, recorded and exploited for the benefit of amateur song writers.

After the indictment was returned appellant attempted to waive a trial by jury, but was unsuccessful because of the government's refusal to consent to such waiver.

This court has jurisdiction of the appeal under provisions of §1291(1), 28 U.S.C.

There are many specifications of error upon which appellant relies. The first is predicated upon the claim that an accused has a constitutional right to waive trial by jury and that to condition the right upon consent of the government is a denial of due process as provided by the Fifth Amendment to the Constitution.

Rule 23 of the Federal Rules of Criminal Procedure provides as follows:

"(a) Trial by Jury. Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.

(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially."

Acceptance of appellant's argument necessarily requires a conclusion that the unequivocal language of Rule 23(a) requiring consent of the government before an accused may waive trial by jury is unconstitutional. Although appellant's logic is not lacking some persuasive quality we are of the opinion that constitutionality of Rule 23(a) is well settled.² In accordance with the existing authorities we find no denial of due process in this case.

Other specifications of error include charges that government counsel was guilty of prejudicial misconduct in his opening statement to the jury, in the course of direct and cross-examination of witnesses and the clos-

²*Taylor v. United States*, 142 F. 2d 808 (9th Cir. 1944), cert. den. 323 U.S. 723, Reh. Den. 323 U.S. 813; *Mason v. United States*, 250 F. 2d 704 (10th Cir. 1957); *Patton v. United States*, 281 U.S. 276; 312.

ing argument. Appellant further contends that the trial judge made improper and prejudicial remarks during the course of the trial, made erroneous and prejudicial rulings in connection with the admission and rejection of evidence, gave erroneous instructions to the jury and failed to give necessary and proper instructions, the absence of which resulted in prejudice to appellant. Numerous examples of alleged misconduct on the part of government counsel have been cited by appellant. A review of the record requires a conclusion by this court that appellant was not the victim of such misconduct as to deprive him of a fair trial.

Many of the appellant's complaints are directed to statements of government counsel and the trial judge which took place outside the presence of the jury and which, had they been known to the jury, would have resulted in prejudice to the government's case, and probable advantage to appellant. In those situations where government counsel may have been guilty of improper examination or argument in the presence of the jury the trial judge carefully admonished the jury in such fashion as to eliminate the possibility of prejudice to appellant.

Appellant contends that the trial judge made improper and prejudicial remarks which resulted in an unfair trial to appellant. Illustrations of such alleged prejudicial action fail to support the conclusion urged by appellant. The record in its entirety discloses consistent concern by the trial judge for preservation of the ap-

pellant's right to a fair trial before the jury. It should be mentioned that even if appellant's contentions were found possessed of some merit, his position at this time would be most tenuous. During the course of trial defense counsel made no objection to allegedly improper or prejudicial remarks of the trial court and allegations of such error were raised for the first time in this appeal. In general, failure to object to statements of the court and thus allow correction of error, if any, at the time precludes consideration of such remark for the first time on appeal.

Appellant charges the trial judge with the commission of error in the admission and rejection of evidence in such fashion as to result in prejudice to appellant. No persuasive examples of such rulings have been cited and we are of the opinion that rulings in regard to the admission and rejection of evidence were, if anything, more consistently favorable to the defense than to the government.

Appellant further alleges error in regard to certain instructions which are said to be prejudicial and misleading. The instructions in question, when considered in their entirety are fair and accurate. Failure of appellant to comply with Rule 30 of the Federal Rules of Criminal Procedure requiring objection to instructions before the jury retires to consider its verdict makes extended discussion of this point unnecessary. *Brown v. United States*, (9th Cir. 1955) 222 F.2d 293 at 298.

Appellant's final criticism of the instructions given is directed to alleged failure by the court to give adequate instructions on the elements of criminal fraud. We are of the opinion that the instructions given in this regard were adequate and accurate. No objection to the instructions, as given, were made as required by Rule 30 and we find no reason, under these circumstances, to consider appellant's argument in further detail.

Appellant's attack upon the sufficiency of the evidence is not predicated upon the record. Testimony and documentary evidence introduced as part of the government's case was more than sufficient to sustain the verdict. We find no error in the order of the District Court denying appellant's motion for a new trial and supplemental motion for a new trial.

Affirmed.

(Endorsed) Opinion Filed Jan. 6, 1964.

Frank H. Schmid, Clerk.

APPENDIX B.

Judgment.

United States Court of Appeals for the Ninth Circuit.

Mortimer Singer, Appellant, vs. United States of America, Appellee. No. 18284.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 6, 1964.

APPENDIX C.

On Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Mortimer Singer Appellant v United States of America Respondent. No. 18,284.

Filed Feb 10 1964

**Before: Barnes and Merrill, Circuit Judges, and
Burke, District Judge**

The petition of appellant Mortimer Singer for rehearing in the above cause is denied.

Stanley N. Barnes

Charles M. Merrill

Circuit Judges

/s/ Floyd H. Burke

District Judge

APPENDIX D.

Constitutional Provisions, Statutes, and Rules Involved.

A. United States Constitutional Provisions.

Amendment 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and case of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 9.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 10.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

B. Federal Rules of Criminal Procedure.

Rule 23. *Trial by Jury or by the Court*

(a) *Trial by Jury.* Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) *Jury of Less Than Twelve.* Juries shall be of 12 but at any time before verdict the parties may stipulated in writing with the approval of the court that the jury shall consist of any number less than 12.

(c) *Trial without a Jury.* In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.

Rule 30. *Instructions.*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objec-

tion. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52. *Harmless Error and Plain Error.*

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

C. Federal Statute.

18 U. S. C. Section 1341

"Fraud and swindles

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both"

**Affidavit of Service of Petition for Writ of
Certiorari Pursuant to Rule 33.**

State of California, County of Los Angeles—ss.

Viola Figg, being first duly sworn, deposes and says:

That this affiant is a citizen of the United States of America, a resident of the County of Los Angeles, over the age of eighteen years, not a party to the within and above entitled action; that this affiant is making this service for Sidney Dorfman, Esq., who is the attorney for Mortimer Singer, Petitioner in this action; that this affiant is of the firm of Parker & Son, Inc., 241 East Fourth Street, Los Angeles, California, who are the printers and agents in this matter for said attorney, and have their offices at said address in the City of Los Angeles, State of California.

That on the 6th day of March, 1964, affiant served the within Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on the United States of America, respondent herein, by placing true copies thereof in an envelope, with postage prepaid, addressed to the office address of its attorney of record as follows: Francis C. Whelan and Timothy M. Thornton, United States Attorney for the Southern District of California at Room 600 Federal Building, Los Angeles, California, and by placing true copies thereof in a duly addressed envelope, with *air mail postage prepaid*, to the following address:

Solicitor General,
Department of Justice,
Washington 25, D. C.,

and by then sealing said respective envelopes and depositing the same, with the postage thereon fully prepaid as aforesaid, in the United States Post Office at Los Angeles, California.

That there is delivery service by United States mail at the places so addressed or there is a regular communication by mail between the place of mailing and the places so addressed.

VIOLA FIGG

Subscribed and sworn to before me this 6th day of March, 1964.

MARGARET H. FALES,

*Notary Public in and for the County
of Los Angeles, State of California.*

My Commission Expires January 11, 1966.

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(1)

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 898

MORTIMER SINGER, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 1-6; 1/R. 144)¹ is reported at 326 F. 2d 132.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1964 (Pet. App. B 7; 1 R. 145). A petition for rehearing was denied on February 10, 1964 (Pet. App. C 8; 1 R. 146). The petition for a writ of certiorari was filed on March 9, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹ "R.", preceded by volume number, designates the eleven-volume record on file with the Clerk of this Court.

QUESTIONS PRESENTED

1. Whether a criminal defendant is constitutionally entitled to a nonjury trial if the government does not consent to his waiver of a jury.

2. Whether prejudicial error resulted from statements made by government counsel and instructions given by the court.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

1. Article III, Section 2 of the United States Constitution provides in pertinent part:

* * * * *

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; * * *

2. The Sixth Amendment provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.

3. Rule 23(a) of the Federal Rules of Criminal Procedure provides:

(a) *Trial by Jury.* Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

STATEMENT

After a jury trial held in the United States District Court for the Southern District of California petitioner was convicted on twenty-nine counts of a thirty-count indictment (1 R. 2-34)* charging viola-

*The jury acquitted petitioner on count 12 (1 R. 118; 10 R. 964).

tions of the mail fraud statute, 18 U.S.C. 1341 (1 R. 113-114; 10^a R. 964-965).^{*} Counts 1 through 17 charged the deposit of mail in furtherance of a scheme to defraud, and counts 18 through 30 charged receipt of mail to that unlawful end. Petitioner was sentenced to concurrent 18-month prison terms on counts 1 through 11, and to three years' probation on counts 13 through 30, to commence at the expiration of his prison sentence, with probation conditioned on his payment of a \$250 fine on each of counts 13 through 30 (1 R. 126-127; 10 R. 995-996). The court of appeals unanimously affirmed. (Pet. App. A 1-6; 1 R. 144; 326 F. 2d 132).

The evidence, which is not in issue, shows that petitioner, using the name Ralph E. Hastings, devised and executed a scheme to defraud amateur song lyric writers by means of false and fraudulent pretenses, representations and promises. These false representations, contained in literature mailed by petitioner, were essentially that he was the operator of a legitimate song servicing and marketing enterprise which, for specified fees, would have songs arranged, orchestrated, recorded commercially and exploited for the benefit of the song writers. The evidence reveals that petitioner never did, nor did he intend to, carry out these promises.

Prior to trial petitioner filed a memorandum offering to waive trial by jury "for the purpose of shortening the trial" (1 R. 64). The court expressed its

^{*} The trial court entered a judgment of acquittal as to co-defendant Stephen Francis Singer at the close of the government's case in chief (8 R. 756).

willingness to accept such a waiver (2 R. 12), but the government refused to consent to a nonjury trial (2 R. 19). The case was, therefore, tried to a jury.

ARGUMENT

Petitioner's principal contention is that a criminal defendant has an absolute constitutional right to a nonjury trial if he chooses to waive trial by jury. We submit that the court of appeals and the district court correctly rejected this argument because no such right is granted by the Constitution either expressly or by implication.

1. Article III, Section 2 of the Constitution provides explicitly that the trial of all criminal cases other than impeachments "shall be by Jury." In *Patton v. United States*, 281 U.S. 276, this Court rejected the view that this provision was jurisdictional and that a court was powerless to conduct a criminal trial, even with the consent of all parties, without a common-law jury. The Court noted in *Patton* that rather than being jurisdictional, Article III, Section 2 "was meant to confer a right upon the accused which he may forego at his election." 281 U.S. at 298.

This application of Article III, Section 2 renders its effect similar to that of the Sixth Amendment, which expressly confers on a criminal accused the right to trial "by an impartial jury." But neither Article III, Section 2, nor the Sixth Amendment states or suggests that the converse is true—i.e., that a criminal defendant enjoys an absolute constitutional right to a nonjury trial. For there is an obvious logical and legal distinction between a defendant's

right to demand a constitutionally guaranteed procedure and the right sought here by petitioner—i.e., to prevent that procedure from being used at his trial. The undisputed right of a defendant to waive the former does not necessarily confer the latter right upon him.

2. Moreover, the policy embodied in Article III, Section 2 is more than a bare recognition of a right which the defendant alone may forego. As this Court observed in *Patton* (281 U.S. at 312):

Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant.

This recognition in *Patton* of the fact that trial by jury in criminal cases is not waivable by the defendant's action alone is supported by decisions in various courts of appeals which have sustained criminal convictions after trials by jury notwithstanding pretrial jury waivers by defendants. See *United States v. Dubrin*, 93 F. 2d 499, 505 (C.A. 2), certiorari denied, 303 U.S. 646; *Rees v. United States*, 95 F. 2d 784, 790-791 (C.A. 4); *Mason v. United States*, 250 F. 2d 704, 706 (C.A. 10); *Dixon v. United States*, 292 F. 2d 768, 769 (C.A. D.C.).^{*} Rule 23(a) of the Federal Rules of

^{*} The fact that in some of these cases it was the court which refused to approve a nonjury trial rather than the government

Criminal Procedure, which embodies this policy and which was applied in this case, was foreshadowed not only by *Patton* but by *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-278, in which the Court observed:

We have already held that one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, *where the Government also consents, and where such action is approved by the responsible judgment of the trial court.* [Emphasis added.]

Assuming, *arguendo*, that the denial of a nonjury trial under some circumstances might be so unfair as to present constitutional questions under the Due Process Clause of the Fifth Amendment, petitioner's sole asserted motive in this case in waiving a jury was "for the purpose of shortening the trial" and not because a jury trial was likely to be unfair. Under the present circumstances, therefore, petitioner had no greater constitutional right under Article III, Section 2 to a nonjury trial than a defendant would have under the same constitutional provisions if he waived trial in the district where the offense was committed and moved for transfer to another district. In neither instance does

is no ground of distinction. If the right to a nonjury trial were absolutely guaranteed by the Constitution, as petitioner contends, it would be no more subject to the supervisory discretion of the district court than is its counterpart—the right to trial by jury.

the waiver of the right expressly provided in these sections entitle the accused to his alternative demand.*

3. Petitioner's subsidiary claims of error were carefully reviewed and rejected by the court of appeals. There is no merit to the contention (Pet. 29-34) that the court of appeals disregarded the provisions of Rule 52, which permits a court to notice plain error although not objected to below. As to the alleged misconduct by government counsel, the court found, after "a review of the record" that petitioner was not deprived of a fair trial. As to the court's instructions, the court of appeals found not only that petitioner did not object, but also that the instructions were "adequate and accurate". These conclusions do not warrant further review by this Court.

a. With reference to argument of counsel, petitioner contends that government counsel in his opening statement referred to the anticipated testimony of a Mr. Berg, who, the prosecutor explained, "was engaged in dealing with amateur songwriters with Mr. Singer for the period of mid '55 through 1957" (3 R. 22). During the trial the court concluded that

* The state cases which petitioner cites (Pet. 11) are not in point. In some there was government consent to the waiver, and consequently the courts were not faced with the issue involved here. *E.g.*, *People v. Scudieri*, 383 Ill. 84; *State v. Zabrocki*, 194 Minn. 346; *State ex rel. Warner v. Baer*, 103 O.S. 585. Others involved an interpretation of a specific statutory provision which made it mandatory for the court to try the case without a jury upon the defendant's request, regardless of the prosecution's objection. *E.g.*, *People v. Spegal*, 5 Ill. 2d 211.

Berg's testimony was not admissible on the issue of fraudulent intent since it was too remote in point of time (4 R. 226; 7 R. 527-536). Both during the trial and in his concluding instructions, the trial judge explicitly informed the jury that they were to determine the truth of the charges contained in the indictment "on the basis of the proof offered in the record, not on the basis of the opening statement of either side or of arguments of counsel" (8 R. 703; 10 R. 945).

Petitioner also claims (Pet. 28) prejudice from counsel's use of the word "forgery" in closing argument. However, immediately after the remark was made, the court instructed the jury to disregard the statement and permitted defense counsel to read to the jury from the trial transcript on the point in issue (11 R. 35, 43-45).

b. As to the instructions, there was neither objection nor error. The trial court carefully and fully instructed on the issue of intent in terms of the offense of mail fraud as defined in the statute (10 R. 947-957). The jury was not instructed that petitioner's misrepresentations had to be relied upon because it is not necessary to show reliance in order to prove a mail fraud violation. See *United States v. Bloom*, 237 F. 2d 158, 162 (C.A. 2).

The trial court did not instruct that all the testimony of a witness must be disregarded by the jury if he testified falsely as to any matter (Pet. 24). The judge actually charged in this connection that a

"witness false in one part of his or her testimony is to be distrusted in others" and that all of the testimony of such a witness must be rejected unless the jury "shall be convinced that notwithstanding the base character of the witness, that he or she has, in other particulars sworn to the truth" (10 R. 944).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1964.

MOTION FILED

SEP 2 1964

No. 42 SUPREME COURT, U. S.

IN THE
Supreme Court of the United States
October Term, 1964

MORTIMER SINGER,
v.
UNITED STATES OF AMERICA.
Petitioner,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AMICA
CURIAE AND BRIEF**

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IN THE
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UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF
AMICA CURIAE**

Joni Rabinowitz moves for leave to file the annexed brief amica curiae in the above entitled matter. The movant's interest lies in the fact that the same issue, namely, the right to waive a trial by jury, is presented upon her pending appeal in *Rabinowitz v. United States of America* (C. A. 5th, No. 21256).

Counsel for amica have examined the briefs filed by the parties in this case in the Court of Appeals for the Ninth Circuit, the petition for certiorari, and memorandum in opposition thereto. Counsel are of the opinion, on the basis of those briefs and petition, that the annexed brief presents to the Court an analysis of relevant authorities which should be decisive of the disposition of this case and which were not presented, or were discussed inadequately, in the

Motion for Leave to File Brief Amica Curiae

Court below. In the opinion of counsel, the amica brief will make a substantial contribution to a consideration of the issues before the Court.

The Solicitor General has consented to the filing of the attached brief and his letter is on file with the Clerk of the Court. The petitioner, however, whose position the moving party supports, has not responded to several communications from the undersigned counsel requesting leave to submit this brief.

WHEREFORE, it is respectfully prayed that an order be granted granting leave to file this brief on the issue of the right of the defendant to waive a jury trial in a federal criminal proceeding.

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IN THE
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UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICA CURIAE

Question Presented

This brief is directed to only one of the two issues upon which certiorari was granted in this case, namely, the right of a defendant in a criminal proceeding, pursuant to Article III, Section 2, the Fifth and Sixth Amendments to the Constitution, and Rule 23(a) of the Federal Rules of Criminal Procedure, to waive a trial by jury in a criminal proceeding.

The Interest of the *amica*

The *amica* is a 22-year-old white girl, a student at Antioch College in Yellow Springs, Ohio, and a resident of New Rochelle, New York. On or about April 3, 1963, as part of her work off-campus at Antioch College, she came to Albany, Georgia as a field representative of the Student Non-Violent Coordinating Committee (SNCC) assigned to

work on voter registration. Antioch agreed to credit her project as one that suited the aims of the institution's degree requirements. In July, 1963, Miss Rabinowitz was subpoenaed to appear before a United States grand jury sitting in Macon, Georgia. She appeared before the grand jury on five separate occasions in an inquiry by it concerning the picketing of a grocery store. She stated to the jury that she did not remember seeing the picket line; she thought that if she had seen such picketing, she would have remembered it, and therefore she concluded that she was not in fact present at the time of the picketing. She was thereupon indicted for perjury.

Miss Rabinowitz moved to dismiss the indictment on a number of grounds, including the fact that the grand jury which found the indictment was selected, drawn and summoned in violation of the Fifth Amendment to the Constitution of the United States and Title 8 USC §§ 1861-1865, in that Negroes were intentionally and systematically excluded from serving as jurors solely by reason of their race or color. This motion was supported by extensive testimony in pre-trial proceedings, in which it was established that both the grand and the petit jurors were drawn from a jury list compiled and selected on a racially discriminatory basis similar to that found by the Court of Appeals for the Fifth Circuit for grand and petit juries in the state courts of Georgia. *United States ex rel. Seals v. Wiman*, 304 F. 2d 53, 66, 67. The evidence in these hearings established that the juries did not represent a cross-section of the community and that the jury officials failed to apply the proper statutory standards.

Miss Rabinowitz moved also to transfer the trial to a district out of the South on the ground that she could not obtain a fair and impartial trial in the Middle District of Georgia, or elsewhere in the South.

Prior to the trial, Miss Rabinowitz moved to dismiss the venire summoned for the petit jury on the same

grounds as those urged in support of a dismissal of the indictments. That motion was denied.

Finally, Miss Rabinowitz moved to waive her trial by jury. The Government objected, and the motion was denied by the Court. Thereupon, she renewed her motion to transfer the trial which likewise was denied. The case was tried before a jury selected as above indicated and it returned a verdict of guilty. Miss Rabinowitz was adjudged a youth offender pursuant to Title 18 USC § 5010(b). An appeal was taken and is scheduled for oral argument on November 16, 1964 in the Court of Appeals for the Fifth Circuit.

It is in this context that the *amica curiae* presents to this Court the legal arguments on the subject of the right to waive a jury trial.

POINT I

Rule 23(a) of the Federal Rules of Criminal Procedure does not deprive a defendant of the right to waiver of jury trial.

In the light of its history and the constitutional considerations suggested in Point II below, the provisions of Rule 23(a) for Court approval of, and Government consent to a waiver by a defendant of his right to a jury trial should be applied only to insure that the waiver is a truly voluntary one. As this Court said in *Adams v. United States ex rel. McCann*, 317 U. S. 269, 277:

"The question in each case is whether the accused was competent to exercise an intelligent informed judgment * * *."

And Judge Holtzoff in the light of his vast experience in the field of criminal law administration has pointed out:

"While the Rule requires the consent of the Government to a waiver of a jury trial, as far as the

author is aware, the Government has ordinarily considered giving such consent a pro forma routine matter and has generally granted it as of course without discussion. Obviously, the prosecution should be interested only in seeing that justice is done and should have no interest in the choice of the mode of trial * * *

"After all the right to trial by jury is a constitutional right of the defendant alone. It is intended to be a privilege of the accused. The prosecution has no constitutional right to a trial by jury, and the requirement that it give its consent to a waiver is a purely procedural rule and has always been regarded as such." *Holtzoff, A Criminal Case in the Federal Courts*, 1963, Federal Rules of Criminal Procedure, p. 17 (West Publishing Co.)

According to the Advisory Committee's notes, Rule 23(a) embodies the existing practice as illustrated by this Court's decisions in *Patton v. United States*, 281 U. S. 276 and *Adams v. United States ex rel. McCann*, *supra*. Prior to those cases, there appears to have been no substantial authority challenging the right of the defendant to waive a trial by jury. There was no Federal rule purporting to limit the right and as this Court said in the *Adams* case, "there is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury * * *" (317 U. S. at 275).

In a leading article on the subject, Dean Griswold has set forth substantial colonial precedent for trials before judges alone where no question appears to have been raised as to the right of the Court or prosecutor to participate in the choice. See *Griswold, "The Historical Development of Waiver of Jury Trial in Criminal Cases"* 20 Virginia Law Review 655 (1933-1934). This Court's decisions in *Patton* and *Adams*, *supra*, did not purport to make any change of substance in that existing practice. In neither case did the Court consider the right of the Government or of the Court itself to participate in the

choice of a trial by judge or by jury. In both cases, the right of the accused to waive was in fact upheld. In both cases, therefore, the language on which the Government relies was dictum.

This is not to say that the *Patton* and *Adams* cases are not most pertinent in their holdings. In the *Patton* case, this Court concluded that a jury trial was not part of the structure of Government, and that it was "a right or privilege of the accused." As it said (281 U. S. at 296):

"The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court. . . ."

"In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused. . . ."

Indeed, the Court quoted with approval, at p. 295, the dissenting opinion of Judge Aldrich in *Dickinson v. United States*, 159 Fed. 801, at 870 (C. C. A. 1, 1908):

"It is probable that the history and debates of the constitutional convention will not be found to sustain the idea that the constitutional safeguards in question were in any sense established as something necessary to protect the state or the community from the supposed danger that accused parties would waive away the interest which the government has in their liberties, and go to jail.

"There is not now, and never was, any practical danger of that. Such a theory, at least in its application to modern American conditions, is based more

upon useless fiction than upon reason. And when the idea of giving countenance to the right of waiver, as something necessary to a reasonable protection of the rights and liberties of accused, and as something intended to be practical and useful in the administration of the rights of the parties, has been characterized, as involving innovation, 'highly dangerous', it would, as said by Judge Seevers in *State v. Kaufman*, 51 Iowa 578, 581, 2 N. W. 275, 277, 33 Am. Rep. 148, 'have been much more convincing and satisfactory if we had been informed why it would be highly dangerous.' "

The *Adams* case involved the right of the defendant who was not represented by counsel to waive a jury trial. Since the consent of the Court and Government had been given, that was not a matter at issue in the case. While the Court repeated in substance the language of *Patton*, it stated:

"And whether or not there is an intelligent competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case." 317 U. S. 269, 278.

This Court further expressed its views on the subject by stating, at p. 276:

"But procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty or property'."

It concluded significantly at pp. 279 and 280 that "what were contrived as protections for the accused should not be turned into fetters", and that we are forbidden to "imprison a man in his privileges and call it the Constitution".

The meaning of Rule 23(a) is further illuminated by the history of the similar provision adopted by the New York State Constitutional Convention of 1938 and embodied in

the Constitution of the State of New York. Article I, sec. 2 provides in part:

"A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a Judge or Justice of a Court having jurisdiction to try the offense."

In presenting the amendment to the Constitutional Convention, the Chairman of the Committee of the Judiciary, Judge Sears stated:

"It is intended to protect the rights of the defendant, to assure him by the necessity for an approval by the judge of full opportunity to understand what he is doing. That is all there is in this proposal . . ."

and

" . . . there should be some restriction on the right to waive so as to assure the defendant an understanding of what he was doing . . . " (Revised Record of the Constitutional Convention of the State of New York, 1938, page 1274.)

There was no suggestion on the floor of the Convention that the purpose of judicial approval went beyond the assurance that the defendant knew what he was doing. No one suggested that other considerations, such as problems of judicial administration, the competency of the court or the nature of the issues involved were to be weighed by the court to determine whether the defendant could exercise his right to trial by judge alone. The only objection was raised by Mr. (now District Judge) Weinfeld, who recommended that the defendant be required to have counsel before he could waive his right to a jury trial. But Judge Weinfeld made it clear that he was seeking to make it impossible "that a man may be deprived of his right to a trial by jury without a full and adequate understanding of just what he is doing," *ibid.*, p. 1286.

The decisions of the New York courts on this problem are thus highly relevant. Not only is the sense of the New York Constitution close to that of Rule 23(a) but all of the three New York members of the Advisory Committee on Criminal Rules, responsible for the drafting of Rule 23(a), had had experience in the New York State Constitutional Convention. Judge Frederick E. Crane and Judge George Z. Medalie were both members of the New York State Constitutional Convention Committee of 1937, Judge Crane being Chairman of its Subcommittee on Judicial Powers and Administration. Professor Herbert Wechsler was a member of the research staff of the Committee and devoted much time to its work. See *New York State Constitution, Annotated*, p. vi and *Problems Relating to Bill of Rights and General Welfare*, p. vi, both published by New York State Constitutional Convention Committee (1938). All three brought to the deliberations of the Advisory Committee their experiences of several years earlier.

More than usual weight must therefore be given to the New York State's interpretation of its Constitution.

The most recent decision in New York is that of *People v. Duchin*, 16 App. Div. 2d 438 (2d Dept.) 229 N. Y. S. 2d 46 aff'd 12 N. Y. 2d 351, 239 N. Y. S. 2d 670 (Ct. of App. 1963). The defendant was there charged with rape in a case that had received a great deal of publicity. Feeling that he could not receive a fair trial before a jury, and acting through competent counsel, he sought to waive his right to a jury trial. The prosecutor refused to consent but gave no reasons; the court denied the waiver. The Appellate Division held that the judge had abused his discretion in denying waiver. It said:

"The constitutional provision conferred on the defendant the right to have trial by a jury, or without a jury, at his option, unless for some compelling reason arising out of the attainment of the ends of justice his option might not be honored. A contrary

determination would sap the force of the Constitution and render it meaningless save at the uncontrolled will of the court." 16 App. Div. 2d at 485; 299 N. Y. S. 2d at 49.

The case was affirmed on appeal. The Court of Appeals set clear and unmistakable rules for the application of the constitutional provision. Said the court:

"The [constitutional] provision is designed for the benefit of the defendant. When choosing to be tried by a judge alone, he requests a waiver, he is entitled to it as a matter of right once it appears to the satisfaction of the judge of the court having jurisdiction that, first, the waiver is tendered in good faith and is not a stratagem to procure an otherwise impermissible procedural advantage * * * and, second, that the defendant is fully aware of the consequences of the choice he is making. The requirement that the judge give his 'approval' to the waiver was intended * * * solely 'to assure [the defendant] * * * full opportunity to understand what he is doing' " (12 N. Y. 2d at 352, 239 N. Y. S. 2d at 671).

The court concluded:

" * * * a defendant may not be forced to trial before a jury if it sufficiently appears that his election to be tried without one was made knowingly and understandingly, based on an intelligent, informed judgment."

It is in the light of this that we note a recent observation on the subject by Judge Weinfeld, one of the most experienced District Court judges in the United States, whose competence in the handling of criminal matters has given him nation-wide recognition. On September 25, 1963, the Judicial Conference of the Second Judicial Circuit of the United States discussed "The Problems of Long Criminal Trials". In the course of that discussion, Judge Weinfeld was asked his views on the right of the accused

in a criminal case to waive a jury without the consent of the court and the Government notwithstanding the rule under discussion. Judge Weinfeld replied:

" * * * I've given some thought to this very question, because it seems to me that in recent years there have been so many sensational newspaper stories about cases about to be tried that a defendant honestly and sincerely could say that he would prefer the judgment of a single judge and not be tried by a jury of his peers. I don't have to cite instances. You're all aware of many of these cases. I have given some thought to the problem and barring compelling authority—my judgment is that the Rule that we presently have which requires the consent of the prosecution conflicts with a defendant's constitutional right to waive any constitutional right accorded him by the Federal Constitution, and that he does not require the consent of government to give up his right to a trial by jury * * *. So my answer to you is, and my own opinion is, that there is no requirement, constitutionally, that a defendant in order to give up his right to a trial by jury requires the consent of the prosecution—that he has such a right, provided, of course, that it be freely and voluntarily exercised." (34 F. R. D. 205)

POINT II

A construction of Rule 23(a) which would give the Court or the Government the power to force defendant to a trial by jury is unconstitutional.

A construction of Rule 23(a) must be sought which will avoid the substantial constitutional questions which otherwise would be presented by this record. *Rescue Army v. Municipal Court*, 331 U. S. 549, 569. Indeed, the construction of Rule 23(a) for which the Government here contends would clearly be in violation of the Constitution.

1, Article III, Sec. 2, of the United States Constitution provides that:

“[T]he trial of all crimes, except in cases of impeachment, shall be by jury.”

The Sixth Amendment provides that in all criminal prosecutions:

“ . . . the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”

These provisions were adopted for the benefit of the defendant in a criminal case and not for the benefit of the Government. See *Annals of Congress*, 452, 458, 783-85, 787-89 (Gales ed. 1834); Rutland, *The Birth of the Bill of Rights 1776-1791* (1955), *passim*; 3 Story, *Commentaries on the Constitution of the United States*, §§ 1773-74 (1833). A “trial by jury was considered solely a defendant’s safeguard against arbitrary government prosecution when the Constitution and the Bill of Rights were adopted.” *United States ex rel. Toth v. Quarles*, 350 U. S. 11, 16. See, also, *Holtzoff, A Criminal Case in the Federal Courts*, 1963, *Federal Rules of Criminal Procedure*, pp. 17-18 (West Publishing Co.). It is the “right” of the accused, not the Government, which is described in the Sixth Amendment, which also provides that it is the former, not the latter, which is to “enjoy” that right. Indeed, it is difficult to perceive any legitimate interest of the Government in the question as to whether a trial should be held before a judge alone or before a judge and jury. On the one hand, a jury was intended historically to protect the accused against an arbitrary government; on the other hand, particularly in modern times, a jury, more than a judge, is likely to be affected by popular passion and thus unable to give the defendant the fair trial to which he is entitled. But in neither case, can the Government be said to be legitimately interested in the trier of the facts.

Government does have a legitimate interest in being sure that the case is tried before a competent tribunal. But this Court has held that the jury trial provision in Article III, Sec. 2 of the Constitution, is not jurisdictional in the sense that a court without a jury is an incompetent tribunal. This Court has said that Article III, Sec. 2 "was meant to confer a right upon the accused which he may forego at his election"; *Patton v. United States*, 281 U. S. 276 at 298. Subsequently, in *Adams v. United States ex rel. McCann*, 317 U. S. 269, 275, this Court stated that there is "nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury."

While the *Patton* decision does contain rather broad language with respect to the necessity of "the consent of government counsel and the sanction of the court", *supra*, at pp. 312 and 313, this language, as we have argued above at p. 7, is dictum, was not the subject of critical analysis by counsel or the court and has certainly been modified by the language quoted from the *Adams* case. For since the jury trial provisions were inserted to protect the defendant and since the court is competent to try a person accused of crime without a jury, there is, in principle, no reason why a defendant cannot waive a jury trial.

Other constitutional rights designed to protect a defendant may be waived, such as the right to a speedy trial, *Worthington v. United States*, 1 F. 2d 154 (C. C. A. 7, 1924); the right to indictment, *Barkman v. Sanford*, 162 F. 2d 592 (C. C. A. 5, 1947); the right to be confronted by witnesses, *Diaz v. United States*, 223 U. S. 442; *Grove v. United States*, 3 F. 2d 965 (C. C. A. 4, 1925); the right to assistance by counsel, *Adams v. United States ex rel. McCann*, 317 U. S. 269; *Johnson v. Zerbst*, 304 U. S. 458; the right to trial in the state and district of the crime, *United States v. Jones*, 162 F. 2d 72 (C. C. A. 2, 1947); the right to a public trial, *United States v. Sorrentino*, 175

F. 2d 721 (C. A. 3, 1949); the right to protection against double jeopardy, *Trono v. United States*, 199 U. S. 521; and the right to protection against self-incrimination, *Powers v. United States*, 223 U. S. 303.

In none of these cases is there any suggestion that the consent of either Government or court is necessary to make the waiver effective, nor was such consent required. There is a correlation between the right to exercise a constitutional right and the right to waive it. So, in the *Adams* case, this Court referred to "the right to assistance of counsel and the correlative right to dispense with a lawyer's help * * *" (317 U. S. at 279). If the right to dispense with a lawyer's help is correlative to the right to assistance of counsel, so the right to waive a jury trial is correlative to the right to have one. Similarly, the Illinois Supreme Court, in holding that a jury trial may be waived, said in *People v. Spegal*, 5 Ill. 2d 211, 218 (1955): "The power to waive follows the existence of the right and there is no necessity of guaranteeing the right to waive a jury trial."

Aside from the issues inherent in Article III, Sec. 2 of the Constitution and its Sixth Amendment, there are still other constitutional questions of substance which we encounter if Rule 23(a) is to give the Government or the Court a power to veto a defendant's determination to waive a jury trial. The first of these is that it would give to this Court substantive law-making power in violation of Article I, Sec. I of the Constitution of the United States.

Title 18 U. S. C. § 3771 delegates to the United States Supreme Court the power to prescribe "rules of pleadings, practice and procedure * * * in criminal cases". Obviously the power of the Court can extend only to matters of procedure. Not only does the enabling statute so limit the court's authority in express language, but any other conclusion would violate the fundamental concept of our constitutional system which reserves to Congress the right to pass laws.

In *United States v. Sherwood*, 312 U. S. 584, 589, the Court, in considering its analogous power to make rules in civil proceedings, said:

"An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and . . . 28 U. S. C. § 723b . . . authorizing this court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts."

See also, *Mississippi Publishing Corp. v. Murphree*, 326 U. S. 438.

It can hardly be said that the question of whether a defendant is to be tried by a judge or jury is a mere procedural matter. The right of jury trial has always been recognized as one of the fundamental bases of our legal system; the right to waive a jury trial is equally fundamental. To hold that Rule 23(a) subjected the defendant's right to a veto by the prosecution certainly turns that Rule into something far more than a rule of procedure.

2. Further, a construction giving the Government such absolute power would deny a defendant due process in a variety of situations, the most obvious of which is presented by the situation involving this *amica curiae*. In the instant case, the Government has made some advance toward this position by stating:

"Assuming *arguendo* that a denial of a non-jury trial under some circumstances might be so unfair as to present Constitutional questions under the due process clause of the Fifth Amendment . . .". *Singer v. United States of America*, Oct. Term 1964 No. 42, Brief for the United States in Opposition, page 6.

It is perfectly obvious that a jury trial can be prejudicial to an accused in a variety of situations, particularly

where the defendant is espousing an unpopular cause. But even where it is not clear that a jury trial might be unfair, it is plain that where the question is a close one, due process is denied if defendant is compelled to try a case to a jury. A jury trial may be a long, drawn out one, which a defendant is unable financially to sustain. A jury is more easily affected notwithstanding the instructions of the trial judge by the failure of the defendant to take the witness stand. A jury, particularly in a conspiracy case, is not always capable of distinguishing among the defendants. This is not an exhaustive list; it is suggested merely to illustrate the dangers that arise when the Government is given a right to choose.

Conclusion

Amica curiae has presented the foregoing argument in the context of her own particular problem in the case now pending in the Court of Appeals for the Fifth Circuit. She has deemed it appropriate in summary fashion to present the problems confronting her in that case for two reasons: First, the arguments presented above sufficiently show the necessity for a construction of the rule proposed by *amica*. Secondly, it is important in any event that a decision by this Court take into consideration, the variety of circumstances in which the problem of jury waiver can arise and that it not preclude by undue breadth of language the assertion of the Constitutional rights that are involved here.

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 1964
No. 42

MORTIMER SINGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

Opinion Below.

There was no opinion in the District Court. The opinion of the United States Court of Appeals for the Ninth Circuit [R. 23] is reported as *Singer v. United States* at 326 F. 2d 132 (C. A. 9, 1964).

Jurisdiction.

The Opinion and the Judgment of the United States Court of Appeals for the Ninth Circuit in this action were entered on January 6, 1964 [R. 23, 28]. A petition for rehearing was denied on February 10, 1964 [R. 28]. The petition for a Writ of Certiorari herein was filed on March 6, 1964. The Petition was granted by Order of this Court Allowing Certiorari dated April 20, 1964 [R. 104]. The jurisdiction of this Court is based on 28 U. S. C. Section 1254(1).

Questions Presented.

1. May the United States of America constitutionally compel the defendant in a felony case to be tried by a jury against his will and against the will of his counsel when the trial judge has expressed his approval of their valid waiver of a jury trial, but the Government refused to consent thereto?

2. Is Rule 23(a) of the Federal Rules of Criminal Procedure constitutionally valid insofar as it limits the right of the defendant to waive a jury trial by requiring the consent of the Government thereto?

3. Did the failure of the trial court to charge the jury on the elements of the offense charged, combined with the other errors in its charge to the jury, constitute a violation of the due process clause of the United States Constitution so that petitioner was denied a fair trial?

4. Did the improper and prejudicial statements and arguments made by the prosecutor constitute a violation of the due process clause of the Constitution so that petitioner was denied a fair trial?

5. Did the Circuit Court err in failing to apply Rule 52(b) of the Federal Rules of Criminal Procedure in order to correct the manifest and seriously prejudicial errors which occurred at the trial even though they were not called to the attention of the trial court?

Constitutional Provisions, Statutes, and Rules of Court Involved.

The United States constitutional provisions involved include the Fifth, Sixth, Ninth and Tenth Amendments which are set forth in Appendix A (*infra*) page 1. The provisions of Rule 23(a), Rule 30, and Rule 52(b) of the Federal Rules of Criminal Procedure are set forth in Appendix B (*infra*), pages 2 and 3. The provisions of 18 U. S. C. Section 1341, known as the Mail Fraud Statute, are set forth in Appendix C (*infra*) page 4.

Statement of the Case.

Petitioner, Mortimer Singer, was tried and convicted by a jury in the United States District Court, Southern District of California, on twenty-nine counts of an indictment [R. 1] charging thirty separate violations of the Mail Fraud Statute, 18 U. S. C. Section 1341 (Appendix C, page 4).

Counts One to Seventeen of the indictment charged "depositing" of mail in violation of Title 18 U. S. C. Section 1341, and Counts Eighteen to Thirty charged "receiving" mail in violation of the same statute [R. 1-17]. The first count of the indictment set forth the nature of the alleged scheme and the remaining counts incorporated the details thereof by reference to Count One. The indictment charged that beginning on or about July 1, 1957 and continuing to on or about March 15, 1959 appellant devised a scheme to defraud and obtain money and property from amateur song writers, lyric writers, and composers, by means of false and fraudulent pretenses, representations and promises. The indictment further alleged that petitioner falsely represented himself as the operator of a

legitimate and well-established song servicing and marketing business which would, in return for a service charge, be able to have songs, lyrics and other musical compositions arranged, orchestrated, edited, published, recorded, marketed, and exploited for the benefit of persons submitting such materials to petitioner [R. 1].

At the outset of the case, petitioner attempted to waive trial by jury [R. 17, 25, 29]. The trial court was willing to approve the waiver of jury [R. 29-30]. However, the government refused to consent to waiver of a jury and petitioner was compelled to be tried by a jury against his will [R. 30].

Thereafter, in the course of the trial, the Government in its opening statement to the jury improperly presented and detailed other alleged offenses not mentioned in the indictment and made improper arguments which prejudiced the jury [R. 31-41]. For example, the Government referred to and elaborated upon other alleged offenses involving unrelated persons and entities, namely James Carlyle Berg, Melody Masters, or Royal Melody Masters, Thomas and Berg Company, and Winston Publishing Company [R. 40, 41]. None of these persons or entities was involved in this case and no evidence concerning them or petitioner's connection with them, if any, was submitted in this case. However, the effect of describing other alleged criminal offenses that were not included in the indictment and were not proved, was highly prejudicial to the petitioner, and designed to cause the jury to believe or infer that the petitioner was involved in many criminal offenses.

Furthermore, the Government in its opening statement to the jury persisted in making improper arguments and presenting lengthy details as to alleged facts

and evidence and witnesses to be used, as well as attempting to instruct the jury on the law, all of which were highly improper and prejudicial [R. 32-41].

During the trial, the Government persisted in asking improper leading questions and making improper, misleading and prejudicial remarks (see *infra*). In its rebuttal argument to the jury, the Government improperly argued that a certain partnership agreement constituted a "forgery" [R. 98]. There was no adequate legal proof for such a charge [R. 54-55]. The Government also persisted in arguing its own meaning of the words "made available" in its closing argument [R. 83], despite the fact that the Court had ruled during the trial that there was no ambiguity in the agreement requiring interpretation [R. 48].

The damaging effect of the Government's prejudicial misconduct at the trial was further aggravated by the errors of the trial court. The most serious error of the trial court consisted in its failure to give proper instructions to the jury, particularly in failing to define or set forth the necessary elements of the offense charged. The trial court failed to outline all of the separate elements necessary to constitute fraud in connection with the offense charged, although the court had stated in chambers that it would do so [R. 42-43]. Furthermore, the trial court also gave misleading, inadequate, and erroneous instructions concerning circumstantial evidence [R. 67], presumption of innocence [R. 70, 71], impeachment of a witness who gives false testimony [R. 66], and concerning reasonable doubt [R. 71].

All of these errors were brought to the attention of the Court of Appeals but that Court refused to consider

them because it felt itself bound by Rule 30 of the Federal Rules of Criminal Procedure [R. 27; App. B, p. 2]. However, the application of Rule 52(b) of the Federal Rules of Criminal Procedure (App. B, p. 3) was brought to the attention of the said Court of Appeals but said Court did not give any consideration to Rule 52(b) or even mention its applicability.

Summary of Argument.

I.

The right of an accused to refuse a jury trial existed at early common law and preceded the right to demand a jury trial which developed later. This right continued to be exercised in the American colonies at the time the Constitution was adopted. The framers of the Constitution endeavored to protect the rights of an accused by stating that the accused "shall enjoy the right to trial by jury" (Amendment 6, App. A, p. 1). Since the right to demand includes the right to refuse and since the broad wording "enjoy the right" would include both, there was no reason to specifically detail the alternate choices. It has been recognized that it is the personal privilege of the defendant to demand or refuse a jury, *Patton v. United States*, 281 U. S. 276. Since the accused can waive other constitutional provisions without the consent of the government, there is no reason why the right to trial by jury should depend on government consent.

These constitutional provisions in respect to trial by jury are for the protection of the accused and not the government. There is nothing in the Constitution giving the right to the government to demand a jury trial in a criminal case. It finds its only support in the *obiter dicta* in the *Patton* case which cited no authority

for the proposition. Out of this developed Rule 23(a) of the Federal Rules of Criminal Procedure (App. B, p. 2) which states that the defendant may waive a jury with the approval of the court and the consent of the government. Unfortunately, this gives the government the arbitrary power to compel the accused to have a jury trial against his will. In effect, it gives the government the right to secure a jury trial in a criminal case which right is not granted by the Constitution and which abridges the rights of the accused to exercise his choice. This is contrary to the accused's historical and basic rights, and inconsistent with the concepts of personal liberty. Furthermore, the prosecutor has an adverse interest and can not be a proper guardian to decide for the accused what choice should be made as to a jury trial. Since the accused's right to waive a jury existed long before the Constitution and at the time the Constitution was adopted and since there is nothing in the Constitution giving the Government the right to a jury trial in a criminal case, it is a violation of the Fifth, Sixth, Ninth, and Tenth Amendments to the Constitution to give the Government the right to a jury and to permit the government to veto the right of the accused to waive a jury.

It is the accused's life and liberty that are at stake and he is the one who should decide whether to stand trial by judge or by jury. It is recognized that there are many occasions and situations where the jury would be prejudiced, moved by passion, public feeling, lack of sufficient knowledge, experience, insight, or for some other reason not able to give the accused a fair trial. When the Constitution says that the accused shall "enjoy" the right to trial by jury, it means that the ac-

cused shall have the free exercise thereof and not that he shall be "compelled" to have a jury. What was "given to him as a shield should not be used as a sword."

These provisions were designed to safeguard the liberty and security of the citizen and are to be given a broad and liberal construction with meaning given to all of the words "enjoy the right".

II.

Nowhere in the Constitution is the Government given the right to demand a jury trial in a criminal case. Yet by Rule 23(a) (App. B, 2) the Government, in effect, exercises the right to demand a jury trial and to compel the defendant to undergo a jury trial against his will. We can find no historical, logical or valid legal basis for giving the Government such a right. Since Rule 23(a) operates to abridge the defendant's right to waive a jury trial, it violates his constitutional rights under the Fifth, Sixth, Ninth, and Tenth Amendments (App. A, p. 1).

Rule 23(a) is also invalid because it affects the *substantive rights* of the defendant and because the Court has no power to change the substantive rights of a defendant where it has been given the power to prescribe rules of pleading, practice and procedures, *United States v. Sherwood* (1940), 312 U. S. 584, 591.

III.

The trial court failed to give a complete definition of fraud to the jury and to outline all of the necessary elements of the offenses charged with the result that the jury could not reach an intelligent or proper verdict. The court further gave erroneous and misleading in-

structions concerning circumstantial evidence, impeachment of a witness who gives false testimony, presumption of innocence, and on reasonable doubt. These substantial and serious errors deprived petitioner of a fair trial and violated his constitutional rights under the "due process" clause of the Fifth Amendment.

IV.

The rules of conduct for the Government as prosecutor in a criminal case are set forth in *Berger v. United States*, 295 U. S. 78 at page 88 where the court states that the position of United States attorney as follows: "... and whose interest therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done."

Unfortunately, during the course of the trial the Government's attorney persisted in asking improper questions and making statements that were improper, misleading and prejudicial so that defendant was deprived of a fair trial.

Furthermore, in his opening statement the prosecutor referred to other alleged offenses not in the indictment, naming and detailing other persons and entities none of which was involved in this case, and no evidence concerning them or petitioner's connection with them, if any, was submitted in this case. The effect was highly prejudicial and caused the jury to believe that petitioner was involved in other criminal offenses. Also, in his opening statement, the prosecutor persisted in making improper arguments, presenting lengthy details as to alleged facts and evidence and witnesses to be used as well as attempting to instruct the jury on the law, all of which were highly improper and prejudicial.

Later, in his opening argument to the jury, the prosecutor referred to matters not in evidence and to some which had been specifically disallowed by the Court. This was highly improper and prejudicial. Then, in his rebuttal argument, the prosecutor argued that a certain document was a "forgery". This charge had not been legally proved and this improper remark constituted prejudicial and reversible error. All of the aforesaid prejudicial misconduct of the Government's attorney was such as to constitute a violation of due process and of petitioner's right to a fair trial.

V.

The petitioner was forced to have a jury because the prosecutor arbitrarily refused to consent to a waiver of jury, although the trial judge indicated his approval. It is well known that there are pitfalls, perils, and dangers in trying any case before a jury and petitioner was thereby compelled to assume these burdens. Since nobody but the prosecutor wanted the jury, his was the solemn duty of insuring that he did not abuse the privilege which he had wrested from the petitioner, and his counsel, of choosing the trier of fact.

Unfortunately, the Government abused the privilege and committed prejudicial error and having caused the conviction of petitioner, sits back and challenges him to pin-point a technically sound and timely objection to each and every error, or succumb. This is exactly the contest which petitioner sought to avoid by waiving a jury; this is exactly what the prosecution had no constitutional right to impose upon the petitioner; this is a classical denial of due process. The admonitions of the court to the jury could not undo their effect on the jury. As the court said, "*You cannot unring a bell*".

Under all the circumstances, we respectfully submit that the court below erred when it failed to consider the application of Rule 52(b) of the Federal Rules of Criminal Procedure (App. B, p. 3) in order to correct the plain errors affecting substantial rights although they were not brought to the attention of the trial court.

It has been held that prejudicial statements made by the prosecuting attorney in his argument to the jury constitute reversible error even though no objection was made at the trial, *Brown v. United States* (9th Cir. 1963), 314 F. 2d 293. Likewise, errors in instructions will be noticed even though no objection was made at the trial, *Herzog v. United States* (9th Cir. 1956), 235 F. 2d 664.

None of these authorities is mentioned in the opinion of the court below and there is no discussion whatsoever of Rule 52(b) by the court below. The court below merely referred to the absence of objections by the petitioner as a ground for denying him relief on appeal, citing Rule 30 and the 1955 Brown case which is different from the 1963 Brown case cited by petitioner. Petitioner respectfully urges that under the circumstances it was reversible error for the court below to disregard and to fail to apply Rule 52(b) of the Federal Rules of Criminal Procedure and that the decision of the court below conflicts with the decisions of the Fifth Circuit, the Seventh Circuit, as well as the Ninth Circuit court itself.

ARGUMENT.

I.

Petitioner Was Deprived of His Constitutional and Fundamental Right to Waive a Jury Trial.

Petitioner claims that his fundamental right to *demand* a jury trial in a criminal case includes the right to *refuse* a jury trial and that this basic right can not be abridged by making it dependent upon the consent of the government, for the following reasons:

- (1) **Historically and at the Time of the Adoption of the Constitution, the Right of a Defendant to Waive a Jury Trial Was Recognized.**

It has been established and recognized in the federal courts that a defendant in a criminal proceeding may waive his constitutional right to a trial by jury, *Patton v. United States* (1930), 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263. Furthermore, the defendant has the right to try his own case without a jury even without the benefit of counsel, *Adams v. United States ex rel. McCann*, 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 268, 143 A. L. R. 435.

The question here presented is whether the constitutional rights of the petitioner were violated when his request to waive a jury trial was denied because the government refused to consent to such waiver.

It is interesting and important to note that at early English common law the right to *refuse* a jury trial preceded the development of the right to *demand* a jury trial. Yet, even as trial by jury gradually replaced the older methods of proof and became the primary method

of trial in England, the accused still retained the right to be tried by one of the older methods, rather than by jury. However, the Crown preferred to use trial by jury whenever possible, since a conviction by jury resulted in a forfeiture of the accused's property to the Crown, whereas a conviction by one of the other methods of proof did not, *Holdsworth, A History of English Law* 326 (3rd Ed. 1922). Consequently, although the accused retained a free choice as to whether he would be tried by a jury or not, his "consent" to trial by jury was usually coerced by various means including "peine forte et dure", a form of torture.

Despite its original unpopularity, it quickly became clear in England that the jury might afford an excellent means of protecting the subject against oppression by the government, and the jury became one of the Englishman's cherished possessions, *Jenks, The Book of English Law* 97 (1929). Jury trials for criminal offenses came to America with the English settlers, and there is much evidence, especially in the New England States, that an accused was given a choice as to whether he would be tried by the court or a jury; *Griswold, The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 *Va. L. Rev.* 655, 657 (1934).

The case of *Patton v. United States*, 281 U. S. 276, 281-282, cites with approval the references in the brief of government counsel showing that waiver of trial by jury, even in trials for serious offenses, was permitted in the American colonies in colonial times and at the time of the adoption of the Constitution.

(2) **The Right of an Accused in a Criminal Case to Demand a Jury Trial Necessarily Includes the Right to Refuse a Jury Trial.**

As we have heretofore shown, historically this right to waive a jury trial was ancient and recognized and continued during Colonial times, and logically in drawing the Constitution there was no more need or reason to add words recognizing the right to waive a jury than it was necessary to add such words of waiver to any other constitutional right. The right to demand necessarily implies the right to refuse, *People v. Spegal* (Ill. Sup. Ct. 1955), 5 Ill. 2d 211, 218, 125 N. E. 2d 468, 51 A. L. R. 2d 337; *People v. Fisher*, 340 Ill. 250, 257, 172 N. E. 722. As the Court stated in *People v. Spegal*, 5 Ill. 2d 211 at p. 218, "*The power to waive follows the existence of the right, and there is no necessity of guaranteeing the right to waive a jury trial.*" Also, this is the view in the *Patton* case expressed as follows: "*To deny his power to do so, is to convert a privilege into an imperative requirement*", *Patton v. United States*, 281 U. S. 276, 298.

The logic of this view is further expressed in an article by Oppenheim: *Waiver of Trial by Jury in Criminal Cases*, 25 Mich. L. Rev. 695 at page 702. as follows:

"The constitutional conventions in general had no notions about waiver of jury in criminal cases. If it is true that their sole concern was to prevent the state from denying or abridging that right, it seems manifest that the state does not violate the right when it offers the prisoner a freely exercised option of trial by jury or by judges only." To those defendants who elect the jury, the right remains. It is not denied to those who choose without constraint to give it up."

- (3) Since a Defendant Can Plead Guilty and Waive Any Trial Whatever Without the Consent of the Government, He Must Necessarily Have the Right to Waive a Trial by Jury Without Government Consent.

This proposition is supported by *State ex rel. Warner v. Baer* (1921), 103 Ohio St. 585, 589, which is cited with approval in *Patton v. United States*, 281 U. S. 276 at page 291. In the *Patton* case the court states at pages 296-297 that,

"The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused."

At page 308 in the *Patton* case, the court further states as follows:

"... In short, the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation. The reasons which in some sense justified the former attitude of the courts have therefore disappeared". . . The view that power to waive a trial by jury in criminal cases should be denied on grounds of public policy must be rejected as unsound."

Patton v. United States, 281 U. S. 276, 308.

Accordingly, there is no logical, historical, or legal reason for restricting the right of the defendant to waive a jury in a criminal case.

Among the courts that have recognized the constitutional right of an accused to waive a trial by jury are the following:

Munsell v. People, 122 Colo. 420, 222 P. 2d 615 (1950);

State v. Hernandez, 46 N. M. 134, 123 P. 2d 387 (1942);

State v. Harvey, 117 Oregon 466, 242 Pac. 440, 444 (1926);

Commonwealth v. Petrillo, 340 Pa. 33, 16 A. 2d 50 (1940);

People v. Scuderi, 363 Ill. 84, 1 N.E. 2d 225, 227 (1936);

State v. Zebroeki, 194 Minn. 346, 260 N.W. 507, 508 (1935);

State ex rel. Warner v. Baer, 103 Ohio State 585, 612 (1921).

- (4) **Since a Defendant Can Waive Other Important Constitutional Rights Without the Consent of the Government, He Must Necessarily Have the Right to Waive a Jury Trial Without the Government Consent.**

It has been held that there is "... nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury ..."

Adams v. United States ex rel. McCann, 317 U. S. 269, 275; *Naples v. United States*, 307 F. 2d 618, 625 626 (D. C. 1962).

The Sixth Amendment states that "the accused shall enjoy" certain procedural rights, including the right to trial by jury. But when a procedure established to protect the accused has provided a threat to the proof of his innocence, his right to waive this procedural

safeguard has been recognized and upheld as much as his right to enjoy it. Justice Frankfurter, delivering the majority opinion in *Adams v. United States ex rel. McCann*, 317 U. S. 269, at 280 (1942), made the importance of this two-fold freedom abundantly clear, as follows:

"When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of the accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution."

Thus, the federal courts have firmly established that the accused's right of "enjoyment" includes his right to waive his carefully guarded constitutional guarantees, including the following:

Waiver of right to public trial:

United States v. Sorrentino, 175 F. 2d 721 (3rd Cir. 1949).

Waiver of right to speedy trial:

Daniels v. U. S., 17 F. 2d 339 (9th Cir. 1927);
Worthington v. U. S., 1 F. 2d 154 (7th Cir. (1924)), cert. den. 266 U. S. 626.

Waiver of right to counsel:

Adams v. U. S. ex rel. McCann, 317 U. S. 269 (1942);
Johnson v. Zerbst, 304 U. S. 458 (1938).

Waiver of right to trial in state and district of the crime:

United States v. Jones, 162 F. 2d 72 (2nd Cir. 1947).

Waiver of right to confrontation of witnesses:

Grove v. U. S., 3 F. 2d 965 (4th Cir. 1925);

Diaz v. U. S., 223 U. S. 442 (1912).

• Waiver of freedom from double jeopardy:

Trono v. U. S., 199 U. S. 521 (1905).

Waiver of privilege against self incrimination:

United States v. Murdock, 284 U. S. 141 (1931).

Waiver of right to grand jury indictment:

United States v. Gill, 55 F. 2d 399 (D. C. N. M. 1931);

Barkman v. Sanford, 162 F. 2d 592 (5th Cir. 1947).

Waiver of right to security from unreasonable searches and seizures:

Poetter v. U. S., 31 F. 2d 438 (9th Cir. 1929).

There is no basis for differentiating a jury trial from public trial or any of the other procedural rights. They are all granted in the same document, many of them in the same Amendment, and the Constitution itself sets up no distinction. They are all personal liberties to be enjoyed by the accused and while the right to a jury trial is an historic one, its tradition should not be used to prevent the accused from deciding for himself when it should be exercised.

In fact the rule has been broadly stated in the case of *Barkman v. Sanford*, 162 F. 2d 592 (5th Cir. 1947) at p. 594, as follows:

"It seems thoroughly established that an intelligent accused may waive any constitutional right that is in the nature of a privilege to him, or that is for his personal protection or benefit."

- (5) **The Constitutional Provisions in Respect to Jury Trials Are for the Protection of the Interests of the Accused and Not the Government; There Is Nothing in the Constitution Giving the Government the Right to Demand a Jury Trial.**

Amendment VI of the United States Constitution provides, in part, as follows: "*. . . the accused shall enjoy the right to . . . trial by an impartial jury . . .*" In the case of *Patton v. United States*, 281 U. S. 276 at page 297, the court states:

" . . . it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused." (Emphasis added).

In the *Patton* case (*supra*) the court states further at page 298, as follows:

"Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement." (Emphasis added).

In construing the Constitution and particularly the Bill of Rights, it must be remembered that they were designed to protect the already existing rights of the people and did not create these rights. They are based upon the concept that the people are endowed with certain inalienable rights which include the rights to "*. . . life, liberty, and the pursuit of happiness . . .*" as set forth in the *Declaration of Independence*, and that these rights existed before the Constitution was written. Among these rights are the rights to enjoy

a jury trial which includes the right to waive a jury trial.

This Court has held that there is "... nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury, even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer". *Adams v. United States ex rel. McCann*, 317 U. S. 269, 275 (1942).

Unfortunately, the well-reasoned opinion of the court in the *Patton* case, *supra*, becomes confused by the *obiter dicta* at the end thereof, where the court added gratuitously that the waiver of jury trial should have the approval of the court and the consent of the government. We respectfully submit that this *obiter dicta* portion of the opinion does not cite any authority and is without any legal or historical basis and is inconsistent with the rest of the opinion. It appears to be an afterthought of caution that the accused shall not waive his right to jury trial without careful consideration. However, the requirement of the consent of the government does not protect the accused. What good is the accused's right to waive a jury trial if the government counsel, who is doing his utmost to convict the accused, can arbitrarily refuse to give his consent and thus thwart the efforts of the accused and his counsel? Does this not "convert a privilege of the accused into an imperative requirement" which the court had stated could not be done?

The whole purpose of these constitutional provisions is to protect the accused, particularly against oppression by the government. It is therefore arbitrary, unreasonable, and a deprivation of the accused's constitu-

tional rights to compel him to have a jury trial against his wishes, just because the government arbitrarily and without reason insists upon it. As the court, through Justice Frankfurter stated in *Adams v. United States ex rel. McCann*, 317 U. S. 269 at page 279: "What were contrived as protection for the accused should not be turned into fetters." (Emphasis added).

To require the consent of the Government before defendant can waive a jury trial in effect destroys the defendant's right and gives the Government a right to demand a jury trial. To give the Government a right to demand a jury trial in criminal cases, is contrary to our Constitution, contrary to legal history, and a clear violation of the basic rights of an accused. This principle is supported in the case of *People v. Spegal*, 5 Ill. 2d 211, where the court states at page 218, as follows:

"... that the prosecution's consent is necessary to make such a waiver effective is inconsistent with the defendant's acknowledged power, enables the state to nullify his act and reduces his power to waive a jury trial to a shadow . . . The power to waive follows the existence of the right and there is no necessity of guaranteeing the right to waive a jury trial."

The case of *People v. Spegal* (*supra*) overrules *People v. Scornavache*, 347 Ill. 403, which was contrary. A sharp criticism of the *Scornavache* case and arguments for the unfettered right of an accused to waive a jury trial are set forth in an article by Jerome Hall in 18 *Am. Bar Assn. Journal*, 226, entitled "Has the State a Right to Trial by Jury in Criminal Cases".

The American Law Institute has acknowledged and provided for the right of the defendant to waive trial by jury in a criminal case, *American Law Institute: Code of Criminal Procedure*; Section 266 (1930), as follows:

"In all cases except where a sentence of death may be imposed trial by jury may be waived by the defendant. Such waiver shall be made in open court and entered of record."

Various writers have supported the view that the decision whether trial is to be by jury or before the court should rest with an accused, including the following:

Orfield: *Criminal Procedure from Arrest to Appeal*, 393 (1947)

Grant: *Waiver of Jury Trials in Felony Cases*, 20 Calif. L. Rev. 132, 161 (1932)

Oppenheim: *Waiver of Trial by Jury in Criminal Cases*, 25 Mich. L. Rev. 695, 702 (1927)

Jerome Hall: *Has the State a Right to Trial by Jury in Criminal Cases*, 18 Am. Bar Assn. Journal 226

Griswold: *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 Va. L. Rev. 655 (1934)

Furthermore, it has been held in the federal court that where right to a jury trial exists in petty offenses, the consent of the Government is not necessary to effect a waiver, *United States v. Au Young* (1946), 142 Fed. Supp. 666. We submit that there is all the more reason to recognize the defendant's right to waive a jury trial in more serious offenses.

Since there is nothing in the Constitution giving the government a right to a jury trial in a criminal case and in view of the matters herein set forth, we respectfully submit that any attempt to give a right, directly or indirectly to the government to secure a jury trial in a criminal case and any attempt to abridge the petitioner's right to waive a jury trial, is in violation of petitioner's rights under *Amendments 9 and 10* of the Constitution (Appendix A, pp. 1).

The rights granted to the government under the Constitution are derived from the people; any attempt to abridge the rights retained by the people would amount to an unconstitutional limitation of their inherent rights, including the inherent right to choose between trial by jury or by the court alone.

In construing and applying *Amendment 9* to this case, the fact that the framers of the Constitution did not deem it necessary to state that an accused could also waive his right to a jury, would not disparage such right. Every accused had an inalienable right to demand or refuse trial by jury before the adoption of the Constitution. Therefore, the failure to specify such right does not abrogate such right. In fact, it is significant that the Constitution speaks only of "enjoyment" of certain rights and not of "waiver". They were well aware of the fact that the right to demand includes the right to refuse.

Furthermore, *Amendment 10* of the Constitution specifies that all rights are reserved to the people except such as were specifically delegated to the United States or to the States.

Thus, it is clear that the Government has no constitutional right to demand a jury trial in a criminal case

or to deprive petitioner of his right to waive a jury trial.

(6) The Accused Has a Right to Safeguard Himself Against Oppression or Partiality of a Jury and to Decide What Is Best for Himself.

We must at all times remember that it is the accused's life and liberty that are at stake. It is recognized that there are occasions when a jury might be influenced by passion, prejudice, or public feeling, or lack sufficient knowledge, experience, or insight to give the defendant a fair trial. Often, the subject matter may be too technical or too involved for a jury. This has been aptly expressed as follows:

"Clearly this right is for the benefit of the accused. If he regards it in the particular case as a burden, a hardship, a prejudice to a fair trial, why in the name of reason should he not be permitted to waive it and submit his cause to the magistrate. The local atmosphere with which the jurors are more or less impregnated may not in his judgment have reached the magistrate. He may have the highest confidence in his sense of fairness and justice in determining the facts of his cause, and what was given to him generally as a shield, should not be used as a sword in case he feels that a jury trial in such case would so result." Hoffman v. State, 98 Ohio St. 137, 146-147 (1918) (Emphasis added).

The constitutional provision states that ". . . the accused shall enjoy the right to . . . trial, by . . . jury . . ." [Amendment 6, (App. A, p. 1)]. To "enjoy" the right means to have the free, voluntary and unrestricted use of it and the right to determine when it

shall be exercised. It does not mean to be *compelled* to exercise the right. Consequently, if an accused is *compelled* to have a jury trial, he no longer "enjoys" the right. This thought is expressed in the following opinion:

"The right of an accused person to a jury trial is absolute to the extent that he may have such a trial by claiming it or even by withholding his consent to proceed without it. The State owes to a person charged with a crime a fair and impartial trial, including a strict compliance with every constitutional guaranty, but it is not obliged to force upon him the acceptance of rights and privileges in the face of his desire, informed and expressed, to waive them." *People v. Fisher*, 340 Ill. 250, 257, 172 N. E. 722 (1930) (Emphasis added).

The basic question is: should not the defendant himself have the right to make the ultimate decision as to demand or waiver of jury trial. This view is held by Justice Frankfurter who stated the following in *Adams v. United States ex rel. McCann*, 317 U. S. 269 at p. 241:

"... and since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury",

and at page 242, the court goes on to state: *"What were contrived as protections for the accused should not be turned into fetters."* In that case, the defendant did not even have counsel when he waived the jury. Certainly, this principle should apply all the more where

the accused through capable counsel requests a waiver of jury trial.

In the instant case, the Government arbitrarily refused to consent to a waiver of jury trial, without giving any reason, although the defendant requested the waiver and although the trial court indicated its approval. It appears to be most unjust and contrary to the entire concept of personal liberty. Certainly, the Government should not be the one to determine whether the best interests of the accused would be served by a judge or a jury. The prosecutor has an adverse interest and can not properly act as guardian of the rights of an accused. We respectfully submit that the arbitrary conduct of the Government in this regard is contrary to the standard set forth in the case of *Viereck v. United States*, 318 U. S. 236 (1943), where the court states at page 248, as follows:

"The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. . . . While he may strike hard blows, he is not at liberty to strike foul ones."

(7) To Compel a Defendant in a Criminal Case to Undergo a Jury Trial Against His Will Is Contrary to His Right to a Fair Trial and the Provisions of the Constitution.

The Fifth Amendment to the Constitution (App. A, p. 1) provides, in part, as follows:

"No person . . . shall be deprived of life, liberty, or property, without due process of law."

It is our contention that where the defendant is compelled to undergo a jury trial against his will and against the will of his counsel, when the trial judge has expressed his approval of their decision to waive a jury trial, and only because the government refused to consent thereto, there is a violation of the "due process clause" of the Fifth Amendment as well as of other constitutional provisions.

This provision protects the right of a defendant to a fair hearing, *Wong Yang Sung v. McGrath*, 339 U. S. 33, 50. It supplements the procedural guarantees in the Sixth Amendment and in the preceding clauses of the Fifth Amendment for the protection of persons accused of crime, *Constitution of the United States*, Senate Document No. 170 (1953 Ed.), p. 847.

The case of *Gideon v. Wainwright*, 372 U. S. 335, 339, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), emphasizes that, ". . . due process is a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," and that the due process clause relates to the concept of the accused having a fair trial and the protection of the fundamental rights of an accused. It is further held that due process, ". . . in safeguarding the liberty

of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice, which lie at the base of our civil and political institutions," *Mooney v. Holohan*, 294 U. S. 103, 112 (emphasis added).

Therefore, in applying the test of due process to this case, we submit that since the petitioner had a right to waive a jury trial, it became a mockery to make this right dependent upon the consent of the government, and his constitutional rights were thereby violated.

(8) The United States Constitution and Particularly the Bill of Rights Provisions Thereof Are to Be Liberally Construed in Favor of the Accused.

It is a fundamental rule of construction that the Constitution should receive a liberal interpretation in favor of a citizen especially with respect to those provisions which were designed to safeguard the liberty and security of the citizen, *Byars v. United States*, 273 U. S. 28, 32; *Sgro v. United States*, 287 U. S. 206, 210; *Boyd v. U. S.*, 116 U. S. 616, 635; *Ex Parte Lange*, 85 U. S. 163, 178.

It has been held that in the construction of the Constitution real effect must be given to *all* of the words it uses, *Myers v. United States*, 272 U. S. 52, 151, and that words employed in the Federal Constitution cannot be regarded as meaningless, *Wright v. United States*, 302 U. S. 583, 588.

It has further been held that the constitutional provisions concerning the enjoyment of a right under the Sixth Amendment shall be given a broad and liberal construction in the federal courts, *Gall v. Brady* (D.C.

Md. 1941), 39 Fed. Supp. 504, 513; *Johnson v. Zerbst*, 304 U. S. 458, 462, 463.

Therefore, in construing the provision of the Sixth Amendment whereby "... the accused shall enjoy the right to a trial by jury", the court should recognize the accused's right to refuse a jury trial. Furthermore, the expression "... shall *enjoy* the right" (emphasis added) means that the accused shall have the free, uninhibited and voluntary right to choose a jury trial without any compulsion. Obviously, if the accused is *compelled* to have a jury trial against his will, he is not "*enjoying*" his right to a jury trial.

We, therefore, respectfully submit that an accused has the fundamental right to *refuse* a jury trial as well as the right to *demand* a jury trial, and that there was no intention by the framers of the Constitution to limit his rights in that regard.

II.

Rule 23(a) of the Federal Rules of Criminal Procedure Is Constitutionally Invalid Particularly Insofar as It Limits the Right of the Defendant to Waive a Trial by Jury by Requiring the Consent of the Government Thereto.

Nowhere in the Constitution is the Government given the right to demand a jury trial in a criminal case. Yet by Rule 23(a) the Government, in effect, exercises the right to demand a jury trial and to compel the defendant to undergo a jury trial against his will. We can find no historical, legal, logical or valid basis for giving the Government such a right. Since Rule 23(a) operates to abridge the defendant's right to waive a jury trial, it violates his constitutional rights under the Fifth,

Sixth, Ninth, and Tenth Amendments heretofore cited, (App. A., p. 1).

The learned opinion of the Court of Appeals in this case, *Singer v. U. S.*, 326 F. 2d 132, 133 acknowledges that petitioner's "logic is not lacking some persuasive quality" in urging the unconstitutionality of Rule 23(a) against him. The admitted logic of appellant's position is then said to yield to "well settled" authority exemplified by three cited cases. Careful analysis of each of these cases discloses that none of them settles this highly important constitutional issue well, or at all. *Patton v. United States* (1930), 281 U. S. 276, the only decision of higher authority cited in the Court's learned opinion or by the government in support of Rule 23(a), was a case in which the government stipulated with the defense that a felony trial should continue with eleven instead of the original twelve jurors. The stipulated jury of eleven convicted the defendant, and the United States Supreme Court affirmed. As a matter of fact, the opinion in the *Patton* case comprehensively supports the arguments in favor of petitioner's right to waive a jury trial. The only portion adverse is the *obiter dicta* at the end of its opinion which cites no authority and had no valid basis and does not settle the issues before this Court.

Taylor v. United States (9th Cir. 1944), 142 F. 2d 808, cert. den., 323 U. S. 723, reh. den. 323 U. S. 813, the second authority cited by the Court in support of Rule 23(a) is another case in which the government stipulated with the defendant to continue trial with eleven jurors. The right of a defendant to waive the jury entirely, with the approval of the trial judge, over

the government's objection was neither involved in the *Taylor* case, nor decided by it.

Mason v. United States. (10th Cir. 1957), 250 F. 2d 704, the third and last decision cited in the learned opinion, was a case in which the trial *judge*, and not the prosecutor, insisted upon trial by jury, and refused to approve the defendant's election to be tried by the Court alone. The prosecutor's consent or refusal was never put in issue; the government's position in the matter is not even mentioned in the opinion; and, accordingly, the point with which we are concerned was in no wise involved or decided.

Thus, of the three cases cited by the learned Court in the case at bar, two involve a stipulation by prosecution and defense to a jury trial of eleven, and one involves a refusal by the trial *judge* to approve a non-jury trial. None of the three cases cited involves or decides that the government may constitutionally force (1) the defendant, (2) his counsel and (3) the trial court to bow in unison to the will, whim or motive, whatever it might be, of the prosecutor in choosing or waiving a jury, as was done here.

Writers on the law, who have considered the point, have denounced the Rule 23(a) requirement of consent by the prosecutor as procedurally unconstitutional:

"While the rule requires the consent of the Government to a waiver of a jury trial, as far as the author is aware, the Government has ordinarily considered giving such consent a pro forma routine matter and has generally granted it as of course, without discussion. Obviously the prosecution should be interested only in seeing that justice is

done, and should have no interest in the choice of the mode of trial. *A prosecuting attorney should not be a partisan advocate representing a client.* He is an officer whose function is to assist in attaining a just result, whether it be a conviction or an acquittal. Many years ago an eminent Solicitor General of the United States^{*} observed that 'the Government always wins a case when justice is done to one of its citizens.'

"After all the right to trial by jury is a constitutional right of the defendant alone. It is intended to be a privilege of the accused. The prosecution has no constitutional right to a trial by jury and the requirement that it give its consent to a waiver is a purely procedural rule and has always been regarded as such.

"The author urges that Rule 23(a) of the Federal Rules of Criminal Procedure be amended by striking out the requirement of a consent of the Government to a waiver of a jury trial."

"A Criminal Case in the Federal Courts" by Alexander Holzoff, cited in the West Publishing Co. edition of the 1960 *Federal Rules of Criminal Procedure*, pp. 17-18.* (Emphasis added).

Another writer puts the matter this way:

"Author's Note to Rule 23: This [Rule 23(a)] appears to state the present law with respect to the right to trial by jury in criminal cases. I

*The author is a United States District Judge for the District of Columbia and former Chairman of the Section of Judicial Administration of the American Bar Association.

could never understand why a defendant should be required to secure the consent of the court and the prosecutor. The effect of this rule is that either the court or the prosecutor can force a jury on him when he does not want it. There is an argument in favor of the court where the death penalty is involved and the court prefers to be excused, but that is subject to debate. In cases involving public passions and prejudices a judge is in danger of an unpopular decision. All of these matters occur to me in considering the position of the judge, but where is the prosecutor entitled to vote? He will insist on a jury when he believes that the prosecution will have an advantage. I never heard of the battle in which the prosecutor won the right to a jury trial."

Federal Rules of Criminal Procedure by Wm. Scott Stewart; copyright 1945; Publisher: The Flood Company, Chicago, Ill.

The federal courts have the power as well as the duty to declare invalid federal rules of procedure which are unconstitutional and should do so in this case.

Rule 23(a) is also invalid on another ground. Although the Supreme Court has been given the power to prescribe rules of pleading, practice, and procedure, it has no power to change the *substantive rights* of a defendant, *Baker v. United States* (1944), 139 F. 2d 721 (C. C. A. 8th); *Mississippi Publishing Corp. v. Murphree* (1946), 326 U. S. 438; *United States v. Sherwood* (1940), 312 U. S. 584.

This principle is set forth in *Federal Criminal Practice Under the Federal Rules of Criminal Procedure*, by William M. Whitman at page 6, as follows:

"However, the (Federal Rules of Criminal Procedure) govern practice and procedure only; the authority of the Supreme Court to prescribe rules of procedure does not empower the court by a procedural rule to deprive a person of a substantive right granted by law."

* We respectfully submit that the right to waive a jury trial in a criminal case is a substantive right which can not be abridged by rule of court.

III.

Petitioner Was Denied a Fair Trial as Guaranteed Under the Fifth Amendment in That His Conviction Rests Upon Instructions to the Jury Which Were Incorrect, Inadequate, Misleading and Prejudicial and in the Failure of the Jury to Receive Other Necessary and Proper Instructions.

The due process clause of the *Fifth Amendment* (App. A, p. 1) relates to the concept of the accused having a fair trial and to the protection of the fundamental rights of an accused, *Gideon v. Wainwright*, 372 U. S. 335, 339, and it is our contention that the learned trial court committed such serious errors in its instructions to the jury that the defendant was thereby deprived of a fair trial.

In considering the instructions to be given to the jury, the trial court stated in chambers that in instructing the jury, the court would rely upon the elements of fraud set out in the cases of *Southern Development v. Silva*, 125 U. S. 247 and *Oppenheimer v. Clunie*,

142 Cal. 313, 318 [R. 42-43]. Nevertheless, the trial court in giving its instructions to the jury failed to give an adequate or complete definition of fraud [R. 67-69]. This was clearly error, *Bird v. U. S.*, 180 U. S. 356. It was basic and all-important that the jury should know and understand all of the separate elements necessary to constitute fraud and to evaluate each one in connection with the offenses charged. The court failed to outline to the jury the following elements required to prove fraud:

- (a) That the defendant has made a representation in regard to a material fact.
- (b) That such representation was false.
- (c) That such representation was not actually believed by defendant on reasonable grounds to be true.
- (d) That it was made with intent to be acted upon.
- (e) That the complainant relied on such representation.
- (f) That in so acting, the complainant was ignorant of its falsity, and reasonably believed it to be true.

The court further erred in its instructions concerning circumstantial evidence. In instructing the jury on the weight and effect of circumstantial evidence in the case at bar, the trial court stated: "*If the circumstantial evidence measures up to all the foregoing requirements, it is the duty of the jury to return a verdict of guilty*" [R. 67] (emphasis added).

This was misleading, erroneous, and prejudicial since not only the *circumstantial evidence* but *all of the evidence* must measure up to the requirements to show guilt beyond a reasonable doubt as well as meet the

other requirements mentioned by the event, *Fry v. Sheedy* (1956), 143 Cal. App. 2d 615, 677, 300 P. 2d 242. It is reversible error to instruct the jury that it is their duty to bring in a verdict of guilty. It was further prejudicial error to give circumstantial evidence more weight or even the same weight as direct evidence, 53 Am. Jur. 573; *State v. Alliance*, 330 Mo. 773, 51 S. W. 2d 51, 85 A. L. R. 471; *Lewis v. Franklin* (1958), 161 Cal. App. 2d 177, 185, 326 P. 2d 625.

The trial court's instruction concerning the impeachment of a witness who gives false testimony, that all of the testimony of such a witness *must be rejected* when he has testified falsely [R. 66] is erroneous since the rule still permits a juror to *accept* other testimony of a witness who has willfully sworn falsely regarding a material fact, if, in spite of merited suspicion on the part of the juror, *he still believes* the balance of the testimony to be true, *People v. Kennedy* (1937), 21 Cal. App. 2d 185, 201, 69 P. 2d 224. It has been held that it would be an invasion of the province of the jury to instruct them that they "must" or "should" disregard the testimony of a witness testifying falsely, 53 Am. Jur. 583 note 1; *Com. v. Ieradi*, 216 Pa. 87, 64 Atl. 889. It has also been held that this instruction should not be given as a matter of course in any case but only where the trial judge suspects that there has been a willful false swearing done in the case; nor even then, if the judge feels that the jury would be warranted by the evidence in coming to a different conclusion as to such testimony, 53 Am. Jur. 582 Notes 3, 6, 7; *State v. Hickam*, 95 Mo. 323, 8 S. W. 252; *Jarrrell v. Com.*, 132 Va. 551, 110 S. E. 430. We respectfully submit that the evidence in this case did not warrant said instruction.

In instructing the jury on the presumption of innocence [R. 70-71], the court's instructions were inadequate and misleading. The court should have instructed the jury that the presumption of innocence continues with the defendant throughout the trial and the deliberations of the jury. *People v. Hardwick*, 204 Cal. 582, 269 Pac. 427.

Furthermore, in instructing on "reasonable doubt", the trial court set a lower standard than is required when it stated as follows:

"But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of a defendant's guilt, *such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt*" [R. 71] (emphasis added).

This instruction was inadequate and misleading. The rule has been set forth in the case of *Miles v. U. S.*, 103 U. S. 304, 309, where the court holds that in order to exclude reasonable doubt there must be a conviction which would involve *matters of highest concern and most important interests, under circumstances where there is no compulsion upon them to act at all.*

The court is required to define terms having a technical meaning in the law and the court's failure to define the elements of the offense constitute reversible error, *Lucas v. Michigan C. R. Co.*, 98 Mich. 1, 56 N. W. 1039; *State v. Terrell*, 55 Utah 314, 324, 186 Pac. 108, 25 A. L. R. 497; *Fry v. Shcedy* (1956), 143 Cal. App. 2d 615, 627; 300 P. 2d 242; *Lewis v. Franklin* (1958), 161 Cal. App. 2d 177, 185, 326 P. 2d 625.

In regard to the failure of the court to give necessary and proper instructions, there is the rule that the defendant is entitled to instructions defining the law applicable to his theory of the case covering his defense, if there is any competent evidence reasonably tending to substantiate that theory, *Little v. U. S.* (C. C. A. 10th), 73 F. 2d 861, 867; *People v. Dole*, 122 Cal. 486, 55 Pac. 581. For example, it has been held that an honest belief in the representations being made is a good defense, *Rudd v. U. S.* (C. C. A. 6th), 173 Fed. 912.

We respectfully submit that the foregoing constituted a violation of petitioner's constitutional rights under the due process clause of the Fifth Amendment.

IV.

Petitioner Was Denied a Fair Trial as Guaranteed by the Constitution by Reason of the Improper and Prejudicial Statements, Arguments and Conduct of the Government.

It is reversible error for the prosecutor in his opening statement to refer to incompetent or irrelevant matters especially if they are prejudicial, *State v. Peters*, 82 R. I. 292, 107 A. 2d 428, 48 A. L. R. 2d 999; *People v. Fleming*, 166 Cal. 357, 379, 136 Pac. 291.

The Government's attorney in his opening statement referred to other alleged offenses involving other persons and entities to wit, James Carlyle Berg, Melody Masters or Royal Melody Masters, Thomas and Berg Company, and Winston Publishing Company [R. 40, 41]. None of these persons or entities was involved in this case and no evidence concerning them or the petitioner's connection with them was submitted in this case. However, the effect of setting forth other al-

leged criminal offenses that were not included in the indictment and were not proved, was highly prejudicial to the petitioner and caused the jury to believe that the petitioner was involved in many other alleged criminal offenses.

Furthermore, the prosecutor in his opening statement to the jury persisted in making improper arguments and presenting lengthy details as to alleged facts and evidence and witnesses to be used as well as attempting to instruct the jury on the law, all of which were highly improper and prejudicial [R. 32-41]. For example, he states to the jury: "But once you have considered all this, you can't go back to the original state you are in right now." [R. 33]; "This is the key thing. The Mad Hatters want to record" [R. 33]. Then the following: "(Mr. Thornton) Would you have bought, if you were the amateur songwriter, if you had known all of that information . . . Mr. Campbell: Just a minute. I object to the argument.

"The Court: That goes beyond an opening statement. You are now arguing your case. Just state what you are going to prove" [R. 36].

It has been held that it is improper to use the opening statement to embody or convey proof by means of unsworn facts or to argue facts or to discuss the law of the case, 53 *Am. Jur.* 358; *Scripps v. Reilly*, 35 Mich. 371; *Wells v. Ann Arbor R. Co.*, 184 Mich. 1, 150 N. W. 340.

During the course of the trial, the government's attorney persisted in asking improper questions and making statements which were improper, misleading and prejudicial so that petitioner was deprived of a fair trial [R. 52-53, 54, 57, 58, 61, 63-64].

The persistence of this conduct on the part of the prosecutor provoked the following comments by the trial court:

" . . . The objection is sustained. The jury are instructed to disregard questions and not to imply what the answer might be if it had been given. As I warned you before there is always a danger. Someone once said '*You cannot unring a bell*' and that is true." [R. 58]. (Emphasis added).

The standard of conduct and the duties imposed upon the prosecutor in a criminal case are set forth in *Viereck v. United States*, 318 U. S. 236, 248, 63 S. Ct. 561 (1943) where the court held that the appeal to passion and prejudice by the prosecuting attorney in his closing argument was " . . . offensive to the dignity and good order with which all proceedings in court should be conducted" (p. 248). The court goes on to state the rule as follows at page 248:

"We think that the trial judge should have stopped counsel's discourse without waiting for an objection. The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as

much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one! *Berger v. United States*, 295 U. S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 314. Compare *New York Central R. Co. v. Johnson*, 279 U. S. 310, 316, 318, 49 S. Ct. 300, 302, 303, 73 L. Ed. 706."

It has been held that it is improper and prejudicial for the prosecutor to ask a question to which he expects a negative answer and then fail to offer evidence in support of his contention, *People v. Perez*, 23 Cal. Rptr. 569, 574, 575, 373 P. 2d 617 where the court states at page 575:

"The jury have a right to believe that the District Attorney is in good faith and probably had a hidden source of information."

It is improper and prejudicial for the prosecutor to make statements of alleged fact in the guise of questions propounded to witnesses; *Berger v. United States*, 295 U. S. 78, 79 L. Ed. 1314, 55 S. Ct. 629.

The conduct of the prosecuting attorney during the course of the trial provoked the trial court to state the following:

"The Court: I have warned the jury to disregard it. Counsel doesn't know the rules of evidence. I think between now and the next case he ought to do a little homework and learn the rules of evidence in criminal cases. I am sincere, and I think it is my duty to warn the jury, because you are doing a lot of things that shouldn't be done by a prosecutor. You make statements of what you intend to prove when I have sustained the objection, which is wrong". [R. 61].

In his opening argument to the jury, the prosecutor referred to matters not in evidence, and to some matters which had been specifically disallowed by the court [R. 82-83, 90]. This was highly improper, *Scripps v. Reilly*, 35 Mich. 371, 387; *Wells v. Ann Arbor R. Co.*, 184 Mich. 1, 150 N. W. 340, 344.

Further, the prosecutor improperly argued that the jury *must* draw certain inferences which he wanted them to draw [R. 95]. The prosecutor continued his tactics of trying to read into the oral and written evidence his own terms and conditions, interpretations, meanings and innuendoes, and to have the jury infer wrongful and sinister meanings in every word and act [R. 83, 85, 87, 88, 89, 90, 94]. Likewise, the prosecutor persisted in arguing matters which had been ruled out by the court, all of which were highly prejudicial and which necessarily influenced the jury. For example, he argued about the meaning of "made available" although the court had ruled there was no ambiguity [R. 88, 48]. Another example is shown where the prosecutor argued both in his opening statement and in his opening argument that petitioner had an interest in Eagle Pass Music Publications despite the fact that the entire ownership was shown to be otherwise [R. 40, 52, 53, 54, 88, 94].

In his rebuttal argument to the jury, the government's attorney made improper and prejudicial remarks. He argued that one of the documents was a "forgery" and he argued to the jury, "That isn't so, that is a forgery" [R. 98]. There was no legal proof for such a charge [R. 54-55]. This argument was highly improper and prejudicial and constituted reversible error, *Viereck v. United States*, 318 U. S. 236.

We respectfully submit that the prejudicial misconduct of the Government's attorney was such as to constitute a violation of due process and of petitioner's right to a fair trial.

V.

The Learned Court Below Erred in Failing to Apply Rule 52(b) of the Federal Rules of Criminal Procedure in Order to Correct the Manifest and Seriously Prejudicial Errors Which Occurred at the Trial Even Though They Were Not Called to the Attention of the Trial Court.

The pitfalls, perils and dangers of trying any case before a jury are well-known to every trial lawyer, judge and justice. Trial by jury differs not merely in degree but in kind from trial by the court alone.

"The less rigorous enforcement of the rules of evidence, the greater informality in trial procedure—these are not the only advantages that the absence of a jury may afford to a layman who prefers to make his own defense. In a variety of subtle ways trial by jury may be restrictive of a layman's opportunities to present his case as freely as he wishes. And since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury." *Adams v. United States ex rel., McCann* (1942), 317 U. S. 269, 278.

The petitioner here and his trial counsel, with the approval of the trial judge, chose a court trial; but the prosecutor decided that the case should be tried before a jury. To say the least, this unconstitutional arroga-

tion of power by the prosecutor carried with it a high and grave duty of scrupulous regard on his part for the niceties of procedural fair play. Since nobody but the prosecutor wanted the jury, his was the solemn duty of insuring that he did not abuse the privilege which he had wrested from the petitioner, and his counsel, of choosing the trier of fact.

The opinion of the court below refers to "situations where government counsel may have been guilty of improper examination or argument in the presence of the jury" as well as "numerous examples of alleged misconduct on the part of government counsel" [R. 26], and "alleged failure by the court to give adequate instructions on the elements of criminal fraud" [R. 27]. However, the response of the court below to these specifications of obvious prejudicial error, which cannot be made to disappear simply by denying their existence, is that (1) the petitioner failed to make timely objections, and (2) that the jury was duly admonished.

However, the need to make timely, pointed, legally sound and valid objections to prejudicial misconduct before the jury was thrust upon the petitioner against his will by the prosecutor himself. The petitioner did not ask for the jury and he did not invite or commit the prejudicial error with which the record abounds. Having forced the jury upon the petitioner, the prosecution then indulges in an opening recitation of other alleged offenses which were entirely extraneous and unproven, accused the petitioner in his closing argument of "forgery" with which he was not charged and which was unproven, admittedly failed to present an adequate instruction on mail fraud to the trial judge who accordingly did not define for the jury the elements of

the crime, and generally played upon the passions and prejudices of the jury. Now the prosecution sits back after the petitioner has been convicted and challenges him to pinpoint a technically sound and timely objection to each and every error, or succumb. This is exactly the contest which the petitioner sought to avoid by waiving a jury; this is exactly what the prosecution had no constitutional right to impose upon the petitioner; this is a classical denial of due process.

The second response to petitioner's specifications of prejudicial error is that the trial judge duly admonished the jury. Aside from the point that petitioner constitutionally attempted, with the approval of the trial judge, to avoid a trial by jury, where admonitions would not be at all necessary, it is crystal clear that judicial admonitions are no match for the subtle and hidden but immensely powerful forces of mass psychology. These forces can no more be controlled by admonitions than could the sea by King Canute. These forces were called into play, and played upon with error, by the prosecution over the constitutional objection of the defense. This was a denial of due process beyond the corrective reach of any admonition.

The learned court below failed to consider the application of Rule 52(b) of the Federal Rules of Criminal Procedure which provides that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court" (App. B, p. 3).

It has been held that prejudicial statements made by the prosecuting attorney in his argument to the jury constitute reversible error even though no objection was made at the trial, *Brown v. United States* (9th

Cir. 1963), 314 F. 2d 293; *Ginsberg v. United States* (5th Cir. 1958), 257 F. 2d 950; *Wagner v. United States* (5th Cir. 1959), 263 F. 2d 877. Likewise, errors in instructions will be noticed even though no objection was made at the trial, *United States v. Raub* (7th Cir. 1949), 177 F. 2d 312, *Herzog v. United States* (9th Cir. 1956), 235 F. 2d 664.

None of these authorities is mentioned in the opinion of the court below and there is no discussion whatsoever of Rule 52(b) by the court below. The court below merely referred to the absence of objections by the petitioner as a ground for denying him relief on appeal, citing Rule 30 and the 1955 *Brown* case.*

In view of the foregoing, it would appear that there is a conflict between the decision of the Court of Appeals in the case at bar and those decisions of other circuit courts cited above, including prior decisions of said Ninth Circuit Court itself concerning the application of Rule 52(b). However, the cases cited by petitioner which invoke Rule 52(b) clearly entitle him at the very least to a careful consideration of its applicable effect here. Thus, in *Herzog v. United States* (9th Cir. 1956), 235 F. 2d 664 at 666 this court said:

"Criminal Rule 30 by its terms precludes a party from assigning as error the giving of an instruction to which he has not objected on the trial. Rule 52(b), appearing under the caption 'General Provisions,' is not directed to the party, but is a grant of authority to the court itself. These rules

*The case of *Brown v. United States* (9th Cir. 1955), 222 F. 2d 293 cited in the Court's opinion is a different case from *Brown v. United States* (9th Cir. 1963), 314 F. 2d 293 cited by petitioner.

are not conflicting. Rather, they complement each other. Rule 52(b) was doubtless designed to take care of unusual or extraordinary situations where, to prevent a miscarriage of justice or to preserve the integrity of judicial proceedings, the courts are broadly empowered to notice error of their own motion. The Rule is in the nature of an anchor to windward. It is a species of safety provision the precise scope of which was left undefined. Its application to any given situation must in the final analysis be left to the good sense and experience of the judges.

"Subsequent to the adoption of the criminal rules many of the circuits have noticed asserted error in instructions not objected to below. See cases cited in the footnote."

In *United States v. Raub* (7th Cir. 1949), 177 F. 2d 312, where a conviction for income tax evasion was reversed for improper instructions, the Court of Appeals said at page 315:

"It appears to be generally established now that— Rule 30 notwithstanding, in criminal cases involving life or liberty of a defendant, an appellate court may notice plain and seriously prejudicial error in the instructions, even though it was not called to the attention of the trial court."

In *Ginsberg v. United States* (5th Cir. 1958), 257 F. 2d 950 at page 955 the court stated:

"... authority is not wanting for enforcement of the fundamental rules of fairness even when no exception is taken to the argument.

"We hold that this statement of the prosecuting attorney constituted 'plain errors . . . affecting substantial rights' under Rule 52(b), 18 U.S.C.A., governing criminal procedure. It was such an error, also, as would have been magnified in its influence on the jury by an objection and motion for mistrial. It made it so unlikely that the petitioner could be given a fair trial, as the term is understood in our jurisprudence, that we hold it to be reversible error."

Petitioner respectfully and sincerely urges that under all of the circumstances it was reversible error for the court below to disregard and to fail to apply Rule 52(b) of the Federal Rules of Criminal Procedure and that, in any event, there is a conflict in the decision of the court below concerning Rule 52(b) with the decisions of the Fifth Circuit and Seventh Circuit as well as the Ninth Circuit Court itself, which should be resolved by this court.

Conclusion.

For the reasons hereinabove stated, it is respectfully submitted that the judgment of the court below should be reversed with directions to the Trial Court to dismiss the charges.

Respectfully submitted,

SIDNEY DORFMAN,

Attorney for Petitioner.

APPENDIX A.

United States Constitutional Provisions.

Amendment 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and case of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 9.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 10.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX B.

Federal Rules of Criminal Procedure.

Rule 23. *Trial by Jury or by the Court*

(a) *Trial by Jury.* Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) *Jury of Less Than Twelve.* Juries shall be of 12 but at any time before verdict the parties may stipulated in writing with the approval of the court that the jury shall consist of any number less than 12.

(c) *Trial without a Jury.* In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.

Rule 30. *Instructions.*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objec-

tion. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52. *Harmless Error and Plain Error.*

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX C.

Federal Statute.

18 U. S. C. Section 1341

“Fraud and swindles

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both . . .”

**Affidavit of Service of Brief for the Petitioner
Pursuant to Rule 33.**

State of California, County of Los Angeles—ss.

Viola Figg, being first duly sworn, deposes and says:

That this affiant is a citizen of the United States of America, a resident of the County of Los Angeles, over the age of eighteen years, not a party to the within and above entitled action; that this affiant is making this service for Sidney Dorfman, Esq., who is the attorney for Mortimer Singer, Petitioner in this action; that this affiant is of the firm of Parker & Sons, Inc., 241 East Fourth Street, Los Angeles, California, who are the printers and agents in this matter for said attorney, and have their offices at said address in the City of Los Angeles, State of California.

That on the 9th day of Sept., 1964, affiant served the within Brief for the Petitioner on the United States of America, respondent herein, by placing true copies thereof in an envelope, with postage prepaid, addressed to the office address of its attorney of record as follows: Francis C. Whelan and Timothy M. Thornton, United States Attorney for the Southern District of California at Room 600 Federal Building, Los Angeles, California, and by placing true copies thereof in a duly addressed envelope, with *air mail postage prepaid*, to the following address:

Solicitor General,
Department of Justice,
Washington 25, D.C.,

and by then sealing said respective envelopes and depositing the same, with the postage thereon fully prepaid as aforesaid, in the United States Post Office at Los Angeles, California.

That there is delivery service by United States mail at the places so addressed or there is a regular communication by mail between the place of mailing and the places so addressed.

VIOLA FIGG

Subscribed and sworn to before me this 9th day of September, 1964.

MARGARET H. FALES

*Notary Public in and for the County
of Los Angeles, State of California.*

My Commission Expires January 11, 1966.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 42

MORTIMER SINGER, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 23-27) is reported at 326 F. 2d 132.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1964 (R. 28). A petition for rehearing was denied on February 10, 1964 (R. 28). The petition for a writ of certiorari was filed on March 9, 1964, and was granted on April 20, 1964 (R. 104; 377 U.S. 903). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the constitutional guarantee of trial by jury gives the defendant in a federal criminal case the absolute right to be tried by the court rather than by a jury.

2. Whether the provision in Rule 23(a) of the Federal Rules of Criminal Procedure that the court may accept a defendant's waiver of a jury trial only if the government consents, is valid.

3. Whether the court's instructions to the jury or certain statements of the prosecutor denied petitioner a fair trial.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

1. Article III, Section 2, of the United States Constitution provides:

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial; by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

favor, and to have the Assistance of Counsel for his defense.

3. Rule 23(a) of the Federal Rules of Criminal Procedure provides:

Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of California on 29 of 30 counts charging use of the mails in a scheme to defraud amateur song writers (R. 18-19). He was sentenced to concurrent terms of imprisonment for eighteen months on counts 1 through 11; and was placed on probation for three years on the other counts, commencing at the expiration of his prison sentence and conditioned on the payment of a fine of \$250 on each of counts 13 through 30 (R. 20-21).

1. The essence of the scheme to defraud was misrepresenting to amateur song writers that their songs could be marketed commercially if (a) they authorized the Madhatters, a professional vocal group that wished to use the song, to record it, and (b) petitioner had the song published by the Eagle Pass Music Publishing Company, which allegedly was an active and responsible publisher (R. 1-13). The scheme operated as follows: The Ralph E. Hastings Company, which petitioner operated, sent a letter to amateur

song writers stating that the Madhatters wanted to record their songs, and requesting the song writer to advise Hastings (the name under which petitioner operated) if he did not have orchestral and vocal arrangements for the song. Enclosed with the letter was a leaflet listing motion picture credits and other professional appearances of the Madhatters and naming Hastings as their manager. If the song writer indicated that he was interested but did not have the orchestral and vocal arrangements, petitioner informed him that the regular fee for orchestration and vocalization was \$87.50. When the songwriter paid, petitioner sent him a form letter stating that the Madhatters had recorded the song, and urging the song writer to send petitioner \$94.00 to produce 100 copies of the record so that petitioner could distribute them to selected disc jockeys and have them available for sale to music stores.

Petitioner also represented that he planned to negotiate with an active responsible publishing company to have the song published. A telegram followed advising that a publisher had been obtained and that the publisher would issue a royalty, publication contract as soon as he was informed that the records were being manufactured. After the song writer transmitted to petitioner the amount specified for making the records, or a reduced amount suggested if the first proposal was not accepted, the song writer received from the Eagle Pass Music Publishing Company a standard song-writer's contract signed by Dallas Turner (R. 44-51, 37-38, 80-81, 86, 88-92; Tr. 124, 129, 172,

174). Ultimately, the song writer received from petitioner a letter stating that his song-recording contract had terminated automatically after six months and that the Hastings Company had no further interest in it. In some instances, the writer was told to continue further correspondence with the publisher (R. 51-52, 39; Tr. 125).

There was evidence that petitioner did not operate a legitimate song marketing service and did not attempt to exploit the songs for the benefit of the song writers. The Madhatters never heard of the song until they were ready to record it; they were paid to make the recording; and they had no public professional engagements (Tr. 198-202). Evidence concerning the operations and income of the Eagle Pass Music Publishing Company showed it was not an active responsible firm (Tr. 685-686, 572-573), and that petitioner was billed for the printing of its publishing contract (Tr. 707). The records bore the initials M. H. but did not indicate that they were Madhatters' recordings (R. 89).

Petitioner, who testified in his own behalf, asserted that he had acted in good faith in attempting to promote the songs. He stated that the letters he used were forms supplied to him by Sanford Dickenson who had operated the business previously and who, until his death in August, 1958, arranged for production of the records (Tr. 830-840). Petitioner claimed that he had carefully selected the song writers whom he solicited; that he had in fact mailed out records to disc jockeys; and that he had notified music distribu-

tors about the songs (Tr. 840-842). He admitted that the only song publishing agreements that he secured were with the Eagle Pass Company, but claimed that he had discussed songs with other publishers (Tr. 852).

2. Prior to trial, petitioner's counsel twice stated that petitioner wanted to waive a jury (R. 29, Tr. 22-23). He gave no reason, other than stating that "[t]his would be a good case to test" the validity of the provision in Rule 23(a) of the Federal Rules of Criminal Procedure requiring the government's consent to a waiver (Tr. 22-23). The trial judge stated that if both parties agreed to a waiver, he would accept it, but the Assistant United States Attorney refused to waive (R. 30). On the opening day of the trial petitioner, "[f]or the purpose of shortening the trial," offered in writing to "waive [his] right to a trial by jury and to submit the evidence to the decision of this honorable court" (R. 17). Because of the government's refusal to consent, however, the case was heard by a jury which, after a two-week trial, convicted petitioner on all but one of the counts.

SUMMARY OF ARGUMENT

I

The principal issue in this case is whether the Constitutional guarantee of trial by jury gives the defendant the absolute right to be tried by the court rather than by the jury. The Constitution in terms gives no such right. Article III, Section 2, provides that "The

trial of all Crimes, except in Cases of Impeachment, shall be by Jury", and the Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *." And, in determining whether the Constitution impliedly confers the right to be tried by a court, the historic federal policy favoring the determination of issues of fact by a jury—particularly in criminal cases—must be given due weight.

A. At English common law, a defendant had no right to compel trial by the court rather than by jury. In America there were some waivers of jury trial prior to and shortly after the Revolution, but there is no indication that the practice was widespread or that defendants in criminal cases were deemed to have the right to choose trial by the court. The framers of the Constitution, therefore, cannot be deemed to have incorporated any settled practice giving the defendant the right to be tried by the court. Indeed, some of the framers believed that the constitutional provision required a jury trial in all criminal cases.

It was not until 1930 that this Court finally ruled that the Constitution permits the defense and the prosecution jointly to waive a jury trial. *Patton v. United States*, 281 U.S. 276. The Court there made it explicit, however, that it was not holding that a defendant's waiver "must be put into effect at all events * * *." [T]he maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent

of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant" (p. 312).

The basic fallacy of petitioner's position is his assumption that because a right granted by the Constitution is primarily for the defendant's benefit, the latter, by "waiving" such right may convert it into the opposite right. For example, although a defendant has a constitutional right to a public trial, he cannot, by "waiving" that right, compel a private trial. Similarly, the effect of a waiver of a defendant's constitutional right to trial by jury is that he cannot thereafter complain if he is not so tried; but such waiver does not confer any right to be tried by the court.

B. The provision in Rule 23(a) of the Federal Rules of Criminal Procedure that the court may accept a defendant's waiver of trial by jury only if the government consents, is valid. Considerations of public policy justify the requirement for consent by court and prosecutor. There are various reasons why trial of a particular criminal case by a jury rather than by a judge would serve the administration of justice. In fraud cases, for example, 12 average members of the community may decide more wisely than a judge whether the misrepresentations were likely to deceive the gullible, or whether the defendant is truthful in claiming that he acted in good faith rather than with the intent to deceive. Thus, inherent in the constitutional procedure for trial by jury (as with so many other constitutional rights) is not only protection of the defendant, but a strong public

interest in preserving the particular practice which the Constitution secures. The drafters of Rule 23 apparently took these policy considerations into account when they decided not to give the defendant the absolute right to decide whether he would be tried by the court.

Rule 23(a) cannot properly be read, as the *amici* would read it, as permitting the prosecutor and the court to withhold consent only to insure that the defendant acted intelligently in seeking to be tried by the court.

In any event, even if there might be circumstances in which a defendant's reasons for wanting to be tried by the court were so compelling that the government's refusal to agree, if unexplained, might be deemed arbitrary, this is not such a case. For here petitioner has shown nothing which even suggests that the jury verdict was based on anything other than an impartial evaluation of the evidence.

II

Neither the trial court's instructions to the jury, nor any statements of the prosecutor, denied petitioner a fair trial. The court properly explained the elements of the offense, fairly described the weight to be given to circumstantial evidence, and correctly stated the law governing testimony of a witness who testifies falsely as to any material matter. The various statements of the prosecutor about which petitioner complains were permissible and, in any event,

any possible prejudicial effect therefrom was cured by the court's cautionary instructions to the jury.

ARGUMENT

I

A DEFENDANT IN A FEDERAL CRIMINAL CASE HAS NO ABSOLUTE RIGHT TO BE TRIED BY THE COURT RATHER THAN BY A JURY

Introduction

Broadly stated, the principal issue in this case is whether the constitutional guarantee of trial by jury gives a defendant in a federal criminal case the right not to be tried by jury, *i.e.*, the right to be tried by the court. Stated more narrowly, the issue is the validity of the provision in Rule 23(a) of the Federal Rules of Criminal Procedure that the court may try a defendant without a jury only if the government consents.

The Constitution, of course, does not in terms give the defendant any right not to be tried by jury. On the contrary, Article III, which defines the judicial power of the United States, states flatly in Section 2: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *." The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *." For many years the seemingly mandatory language of Article III directing that all criminal cases "shall be" tried by jury

gave rise to considerable doubt whether a jury could be waived even with the consent of both prosecution and defense. See below, pp. 14-20.

Since the Constitution does not give a defendant any explicit right to trial by the court, petitioner is forced to argue that such right is given by implication. The argument has two branches, one purporting to rest on history, the other on logic. *First*, petitioner contends (Br. 12-13) that when the Constitution was adopted, a defendant had a recognized right to choose between trial by jury and trial by the court; and that the constitutional guarantee of trial by jury therefore also must have been intended to protect this right of election. As we shall show, however, this argument rests upon a misreading of the historical material, which does not establish that the common law recognized any right by a defendant to choose between trial by jury and by the court.

Second, petitioner contends (Br. 14-24) that since the constitutional guarantee of trial by jury is for the protection of the defendant, the latter may waive it. This argument is a play on words. Of course, a defendant with advice of counsel and acting intelligently may "waive" his right to trial by jury. *Non constat* that he thereby gains the "right" to be tried by the court. For to say that a defendant may "waive" a constitutional right means only that he cannot complain that he was not accorded that right. The fact that a defendant may waive a constitutional right does not give him another constitutional right to a different procedure than the Constitution guarantees. For example, although a defendant may waive

his constitutional right under the Sixth Amendment to be tried in the State and district where the crime was committed, he cannot by such waiver automatically compel transfer of the case to another district. Similarly, a defendant could not compel a private trial by the simple expedient of waiving his right to a public trial, and thereby shield from public scrutiny conduct which he wishes to keep secret.

The constitutional guarantee of trial by jury, although phrased in the Sixth Amendment (but not in Article III) in terms of the individual defendant's right, is, like so many other constitutional rights, intended also to serve a broader public interest. It furthers effective enforcement of the criminal laws, not only by protecting fundamental personal rights, but also by submitting factual determinations in criminal cases to the collective judgment of 12 average members of the community. Rule 23(a) constitutes a reasonable accommodation of these two facets of the public interest by providing that, although a defendant has the absolute right to insist on a trial by jury, he may be tried by the court only if the representatives of the public interest—the judge and the prosecutor—also consent.

A. THE CONSTITUTIONAL GUARANTEE OF TRIAL BY JURY DOES NOT INCLUDE THE RIGHT NOT TO BE TRIED BY A JURY

The determination whether a defendant in a federal criminal case has a constitutional right not to be tried by jury must be made in the light of the vital role

which Anglo-American history and traditions always have given to the jury in the trial of issues of fact—particularly in criminal cases. “The federal policy favoring jury trials is of historic and continuing strength.” *Simler v. Connor*, 372 U.S. 221, 222. A jury trial is “generally regarded as the normal and preferable mode of disposing of issues of fact * * * in criminal cases.” *Dimick v. Schiedt*, 293 U.S. 474, 485–486; *Patton v. United States*, 281 U.S. 276, 312. The underlying philosophy of our judicial system is that a jury, as the representative of the community, has a special competence as a trier of fact. As this Court stated in *Railroad Company v. Stout*, 17 Wall. 657, 664:

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

A jury has “a special aptitude for reflecting the view of the average person.” *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 448 (dissenting opinion). See also the statement of Chief Justice Cooley in *People*

v. Garbutt, 17 Mich. 9, 27, quoted in *Green v. United States*, 356 U.S. 165, 215 (dissenting opinion of Mr. Justice Black). Indeed, the special competence of juries as finders of fact is so well acknowledged that a court may obtain the assistance of advisory juries in civil cases not triable by jury. Rule 39(c), Federal Rules of Civil Procedure.

This favored position which the jury occupies as the trier of facts has its roots deep in the common law. The framers of the constitution intended to preserve and strengthen, and not in any way to curtail, this settled practice of trial by jury.

1. *The background and history of the constitutional guarantee of trial by jury indicate that it does not include the right to trial by the court*

- a. At common law, a defendant had no right to compel trial by the court rather than by jury

In the period of the early development of the jury in England, an accused could choose between trial by jury and trial by battle. After the latter practice was abolished, a defendant who stood mute and refused to plead could not be tried—by a jury or otherwise. In this Pickwickian sense, perhaps, a defendant at that period could be said to have been required to consent to trial by jury. As a practical matter, however, a defendant ordinarily had little choice but to consent to a jury trial, since if he failed to plead he was subject to torture. Moreover, one who advised a prisoner to stand mute was subject to punishment for contempt. (4 Blackstone, *Commentaries* 126 (Tucker ed., 1803).) In 1772 these practices were abolished in England and a plea of guilty was entered for a defendant who stood

mute. 12 Geo. III. c. 20; Thayer, *Preliminary Treatise on Evidence*, 69-82 (1896); 1 Holdsworth, *A History of English Law*, 298-350 (1931); 3 Holdsworth, *Id.*, 607-609 (3d ed., 1923); 2 Pollock & Maitland, *The History of English Law*, 598-652 (2d ed., 1952). Up to that time, however, there is no indication that, except for petty offenses, criminal cases were tried by judges rather than by juries; *a fortiori* a defendant was not permitted to insist on trial by the court.

Prior to and shortly after the American revolution, there is evidence of some waivers of jury trial in Massachusetts, Vermont, Connecticut, Maryland and Pennsylvania. Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 Va. L. Rev. 655 (1934). There is no indication, however, that this was a widespread practice, or that there was any general recognition of a defendant's right to be tried by the court instead of by a jury. In Massachusetts, for example, waiver developed out of its 1641 Body of Liberties which provided that "it shall be the libertie of the plaintife and defendant by mutual consent to choose whether they will be tryed by the Bench or by a Jurie" (*id.* at 661). Much later after Massachusetts became a state, its supreme court held that a statute was required to permit non-jury trials. *Commonwealth v. Rowe*, 257 Mass. 172. In Maryland, the procedure developed from the ancient English practice of submission. At common law, this practice, from which the plea of *nolo contendere* developed, required the assent of the court and eliminated the trial. See *Hudson v. United States*, 272 U.S. 451. Until a statute

was enacted in 1809, non-jury trial in Maryland "had been uniformly confined in practice to those cases of petty offence." Bond, *The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries*, 11 A.B.A.J. 699, 701 (1925). There was one case in Pennsylvania, where a fine was imposed, in which the court expressly overruled the prosecutor's objection that the defendant could not be tried without a jury. Griswold, *id.*, p. 666.

But even if the early instances of non-jury trial were more widespread than the available records indicate, they were still not sufficiently important or recognized that the practice can "be treated as embedded in the Sixth Amendment" (*United States v. Wood*, 299 U.S. 123, 137). This conclusion is confirmed by the history of the Constitution itself, which (1) shows that the framers intended to preserve trial by jury, and contains no intimation that they also intended to give defendants the right to be tried by the court; and (2) indicates that at least some of the framers apparently believed that the constitutional provision for trial by jury required such trial in all cases, *i.e.*, that it would not permit trial by the court even if both the defendant and the prosecutor consented.

b. The framers of the Constitution did not intend to grant any right to trial by the court

In 1774 the First Continental Congress adopted a resolution supporting trial by jury, which declared that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."

1 Journals of the Continental Congress 69. This resolution was directed against the British practice of establishing offenses against the revenue laws which could be tried without juries in the admiralty courts. The Continental Congress also expressed concern against the denial of trial by a jury in the vicinage. *Id.*, at 71-72. The denial of a jury trial was again listed as a grievance in the Declaration of Independence: "For depriving us in many cases, of the benefits of Trial by Jury."

While the proceedings at the Constitutional Convention throw no light on the meaning of the provision in Article II that "trial of all Crimes * * * shall be by Jury,"¹ there are contemporary indications that at least some of the framers believed that it required a jury trial in *all* criminal cases. Thus, in urging adoption of the Constitution, Alexander Hamilton argued that the failure to provide for jury trial in civil cases gave the legislature the authority to adopt or reject that mode of trial, and said: "This discretion, in regard to criminal causes, is abridged by an express injunction of trial by jury in all such cases * * *. The specification of an obligation to try all criminal causes in a particular mode, excludes indeed the obligation or necessity of employing the same mode in civil causes, but does not abridge the power of the Legislature to exercise that mode, if it should be thought proper." *The Federalist*, No. 83 (Dawson

¹ The only reference in the Convention to the clause which became Article III, Section 2, was the addition of an amendment which provides for trials of crimes not committed within any State. 2 Farrand, *Records of the Federal Convention*, 434, 438.

ed., 1863). In the North Carolina convention, James Iredell, in urging that the Constitution be adopted, stated: "The greatest danger from ambition is in criminal cases. But here they have no option. The trial must be by jury, in the state wherein the offence is committed." 4 Elliot's Debates (1854) 145. He also stated: "There is no other safe mode to try these but by a jury. If any man had the means of trying another his own way, or were it left to the control of arbitrary judges, no man would have that security for life and liberty which every freeman ought to have. I presume that in no state on the continent is a man tried on a criminal accusation but by a jury. It was necessary, therefore, that it should be fixed, in the Constitution; that the trial should be by jury in criminal cases, and such difficulties did not occur in this as in the other case." *Id.*, at 171. In the Virginia debates, Edmund Pendleton said that "no other trial can be substituted for that by jury." 3 Elliot's Debates (1854) 521.

Particularly in view of the foregoing opinions that trial by jury was required in all criminal cases, the Constitution cannot be deemed to have converted the "choice" between trial by jury and torture, which the British common law had given defendants, into a choice between trial by jury and trial by the court.² If the framers had intended to make the radical

² In *United States v. Gibert*, 2 Sumner 19, 25 Fed. Cases 1287, 1303-1307 (No. 15,204) (C.C. D. Mass. 1834) Mr. Justice Story, while on circuit, ruled that the British practice of torturing defendants who refused to accept trial by jury had never been adopted in America.

break with the common law that allowing such an election would have entailed, "it is strange, that nothing to that effect appears in contemporaneous literature or in any of the debates or innumerable discussions of the time" (*Patton v. United States*, 281 U.S. 276, 297). In fact, the pertinent evidence, scant though it be, indicates that no such election was given.

The First Congress enacted a statute providing that if any person charged with treason or certain other capital offenses stood mute or challenged peremptorily more than a stated number of jurors,³ the court should proceed to trial as if he had pleaded not guilty. Act of April 30, 1790, Sec. 30, 1 Stat. 119. In *United States v. Hare*, 2 Wheeler, Cr. Cas. 283, 26 Fed. Cases 148 (No. 15,304), C.C. D. Md.), decided in 1818, the defendants stood mute, contending that they could not be tried because the crime charged was not covered by the 1790 statute. The court rejected this contention and ordered that the case be tried by a jury. In *United States v. Gibert*, 2 Sumner 19, 25 Fed. Cases 1287, 1303-1307 (No. 15,204, C.C. D. Mass. 1834), Mr. Justice Story, while on circuit, held that the defendants had no right to choose trial by the court and that, therefore,⁴ it was unnecessary to ask them at arraignment how they wished to be tried. See also *United States v. Borger*, 7 Fed. 193 (S.D.N.Y.).

³ At common law, an accused who attempted to exercise unlimited peremptory challenges was also subjected to torture.
⁴ Blackstone, *Commentaries*, 353-354 (Tucker ed., 1803).

2. *Although a defendant may waive his constitutional right to trial by jury, such waiver does not automatically entitle him to be tried by the court*

As noted above, there was considerable doubt for a time after the Constitution was adopted whether the right to trial by jury could ever be waived. It was not until 1930 that this Court finally held that, in certain circumstances, a defendant could waive his right to trial by jury and be tried by the court. *Patton v. United States*, 281 U.S. 276.

In the *Patton* case one of the jurors became ill during the trial and had to be excused, and the trial continued before the remaining 11 jurors upon the express consent of the prosecution and defense. This Court treated a trial by a jury of less than 12 as a non-jury trial within the meaning of the constitutional provisions (pp. 288-293). It held (pp. 298-299) that Article III, Section 2, "was meant to confer a right upon the accused which he may forego at his election," and that the trial court "has authority in the exercise of a sound discretion to accept the waiver, and, as a necessary corollary, to proceed to the trial and determination of the case with a reduced number or without a jury * * *." The Court pointed out that although this provision states that trial of criminal cases "shall be by jury," the same words in the Judiciary Act of 1789 had long since been held to authorize trial by the court with the consent of both parties; and that since the Judiciary Act had always been considered, in relation to the Constitution, "as a contemporaneous exposition of the high-

est authority," the words should be given the same meaning in interpreting the Constitution (pp. 300-301). The Court made it clear, however, that in upholding a defendant's right to waive trial by jury, it was not holding that "the waiver must be put into effect at all events" (p. 312). It explained (*ibid.*, emphasis added):

* * * Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but *the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had*, in addition to the express and intelligent consent of the defendant.

In *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277, 278, the Court stated that it had held in *Patton* that "one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the trial court." The same principle is also stated in the requirement in Rule

23(a) of the Federal Rules of Criminal Procedure that a defendant's waiver of trial by jury is not effective unless there is also "the approval of the court and the consent of the government." This Rule is discussed *infra*, pp. 27-34.

In short, this Court has thrice recognized—in *Patton*, in *Adams*, and in promulgating the Rules of Criminal Procedure—that while a defendant may waive his right to trial by jury, such waiver does not automatically entitle him to be tried by the court, but only if the government and the court also agree. (Indeed, the decision in *Patton* seems to reflect the view that such consent is constitutionally required.) For, as the Court pointed out more recently, in a case involving the Seventh Amendment, "the right to a jury trial is a constitutional one, however, while no similar requirement protects trial by the court." *Beacon Theatres v. Westover*, 359 U.S. 500, 510.

The basic fallacy of petitioner's position is his assumption that because a right granted by the Constitution is primarily for the defendant's benefit, the defendant by "waiving" such right may convert it into the opposite right. The Constitution gives a defendant the right to be tried by a jury, and his "waiver" of that right does not and cannot automatically give him the right to be tried by the court for there is no such constitutional right. Moreover, a defendant's choice of a trial to the court may properly be subjected to such limitations and conditions as the public interest requires. "When there is no constitutional or statutory mandate, and no pub-

lic policy prohibiting, an accused may waive any privilege which he is given the right to enjoy" (*Schick v. United States*, 195 U.S. 65, 72). We show below (pp. 27-34), in discussing Rule 23(a), that sound considerations of public policy justify requiring the consent of the court and prosecutor before a defendant may be tried by the court. At this point we shall merely show that there are various constitutional rights, designed primarily for the protection of a defendant, which he may waive but which are not thereby converted into new rights that are the exact opposites of the right given.

Although a defendant has a constitutional right to a public trial, he cannot, by waiving that right, compel a private trial. See *United States v. Kobli*, 172 F. 2d 919, 924 (C.A. 3); *Levine v. United States*, 362 U.S. 610, 626 (dissenting opinion). Similarly, while a defendant may waive his constitutional right to be tried in the State and district where the crime was committed, he cannot thereby compel transfer of the case to another district. On the contrary, Rule 21 of the Federal Rules of Criminal Procedure permits transfer only for certain reasons, and then leaves it largely to the discretion of the trial judge to decide whether to transfer. See *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 245; *Kersten v. United States*, 161 F. 2d 337, 339 (C.A. 10), certiorari denied, 331 U.S. 851. Indeed, even where the defendant wishes to waive trial in the district where the indictment is pending and to plead guilty or *nolo contendere* in the district where he has been arrested,

he may do so only if the government consents. Rule 20, Federal Rules of Criminal Procedure.

While a defendant has the right to be present at his trial, he cannot force a trial *in absentia* through waiving that right; rather, he may be compelled over his objection to appear for trial. *Kivette v. United States*, 230 F. 2d 749, 755 (C.A. 5), certiorari denied, 355 U.S. 935; *Swingle v. United States*, 151 F. 2d 512 (C.A. 10). Finally, while a defendant undoubtedly may waive the right to be confronted with the witnesses against him, it has never been suggested that he can thereby compel the government to proceed by stipulating the facts instead of presenting the witnesses in open court. For inherent in the constitutional procedure, in all the cases specified above, is not only protection of the defendant, but a strong public interest in preserving the particular practice which the Constitution secures. See *supra*, pp. 12-14.

Moreover, a defendant's right to proceed without the constitutional guarantees designed for his protection is subject to regulation by Congress, or by the courts through decision or rule. As noted, Rule 20 of the Federal Rules of Criminal Procedure provides that if a defendant wishes to plead guilty in the district where he was arrested, rather than where the crime is committed, the government must consent. Although a defendant may waive prosecution by indictment, Rule 7 of the Federal Rules of Criminal Procedure bars such waiver in a capital case, and this Court recently held that a defendant in a federal kidnapping case in which it was uncertain whether the death

penalty was applicable, could not waive indictment and consent to be prosecuted under an information. *Smith v. United States*, 360 U.S. 1. Even so personal a right as the right to counsel cannot be waived under all circumstances. *Butler v. United States*, 317 F. 2d 249, 257-258 (C.A. 8), certiorari denied *sub nom. Benedic v. United States*, 375 U.S. 836 (unsuccessful attempt to discharge counsel during trial and continue defense *pro se*). Indeed, in most federal capital cases a jury cannot be waived because only it can impose the death penalty. *E.g.*, 18 U.S.C. 1111 (murder); 1201 (kidnapping); 2113(e) (kidnapping or murder in the course of a bank robbery). In short, a defendant's waiver of rights protected by the Sixth amendment frequently is permitted to become effective only if non-observance of the Constitutional procedures is in the public interest.

To recapitulate on this aspect of the case: The language of the constitutional guarantee of trial by jury, the common law practice out of which it evolved, the views of the framers, and the pertinent judicial decisions, all negate the claim that a defendant in a federal criminal case has a constitutional right to be tried by the court. His constitutional right is to be tried by a jury, and "waiving" that right does not give him any concomitant right not to be so tried. The real issue in the case, therefore, is not whether a defendant may waive trial by jury, but whether Rule 23, formulated by this Court and adopted by Congress, may properly require the government's con-

sent as a condition to trial by the court. As we shall show, this limitation in Rule 23 represents a permissible judgment as to the accommodation of the rights of the defendant and the public interest factors involved, and is therefore valid.

B. THE PROVISION IN RULE 23(A) THAT THE COURT MAY ACCEPT A DEFENDANT'S WAIVER OF TRIAL BY JURY ONLY IF THE GOVERNMENT CONSENTS, IS VALID

Rule 23(a) of the Federal Rules of Criminal Procedure provides:

Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

These two limitations on acceptance of a defendant's waiver of trial by jury—approval of the court and consent by the government—are, of course, the limitations which this Court prescribed in *Patton, supra*.

Petitioner's attack on Rule 23(a) (Br. 29-34) is merely another facet of his claim that he has an absolute right to be tried by the court. That is, he argues that such alleged right cannot be limited by the requirement that, before he may be so tried, the government also must consent. If his premise were sound, the conclusion would of course follow. But since, as we have shown, the premise is unsound—i.e., petitioner does not have any constitutional right to be tried by the court—his challenge to Rule 23(a) on that ground must fall.

There still remains the question, however, whether, even though a defendant does not have any constitu-

tional right to trial by the court, it is permissible to require, before he may be so tried, that the court and the government consent. While there is no issue in this case as to the consent of the court, since the latter stated that it would accept the waiver if the government did (R. 30), it is nevertheless appropriate to consider both of these requirements together. For the logic of the argument that since trial by jury is for the benefit of the defendant, he alone should be able to decide whether he is to be so tried, would seem to lead to the conclusion that the consent of neither the government nor the court may be required. Conversely, many of the reasons which justify requiring the consent of one agency are equally applicable to the other.

1. *The requirement that a defendant cannot be tried by the court unless the latter and the government also consent rests on sound considerations of public policy and is a reasonable condition for the conduct of criminal trials*

There are a number of reasons why trial of a particular criminal case by a jury rather than by a judge would better serve the administration of justice. In fraud cases, for example, 12 average members of the community may decide more wisely than a judge whether the misrepresentations were likely to deceive the gullible, or whether the defendant is truthful in claiming that he acted in good faith rather than with the intent to deceive. In cases where strong community feelings and prejudices are involved, trial by jury may be desirable because the community would be more likely to accept the judgment of 12 of its

members as to the defendant's guilt or innocence than the judgment of an individual judge. A jury verdict in such a case also serves to protect court and prosecution from charges of persecution or "whitewashing," and thus increases public confidence in the administration of justice. In such a situation, moreover, a collective group sometimes may be less likely than a single individual to yield to community pressures, either to acquit or to convict. While such examples could be multiplied,⁴ those given are sufficient to show that there are situations where the public interest would be thwarted rather than served if the defendant had the sole right to determine whether he should be tried by judge or by jury.

This is but another way of stating that many constitutional procedures, although designed primarily for the protection of the defendant, also serve a broader public interest. The *Patton* case recognized that "the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions" that, before a defendant may insist on trial by the court, the latter and the prosecutor also must agree (281 U.S. 276, 312).

The drafters of Rule 23 apparently took these policy considerations in account when they made the

⁴ In *United States v. Holt*, 333 F. 2d 455 (C.A. 2), pending on petition for certiorari, No. 234, this Term, the trial judge had presided at an earlier case involving the same subject matter. He refused to accept the defendant's waiver of a jury trial to avoid the possibility that any facts he had learned in the earlier case might—even subconsciously—influence his judgment in the second case.

determination not to give the defendant the absolute right to decide whether he would be tried by the court. For the arguments which are here made in support of the claim that the government should not be permitted to prevent a defendant from being tried by the court were presented to, but rejected by, the Advisory Committee on the Criminal Rules which formulated Rule 23.

In May, 1942, the Advisory Committee submitted a draft to this Court providing that "Trial shall be by jury unless the defendant in writing with the approval of the court and the consent of the government waives a jury trial." The notes to the First Preliminary Draft cite the *Patton* decision as authority for this provision. The notes (to former Rule 21) also refer to State practice subsequent to *Patton* under which consent of the prosecution was not required for a waiver of trial by jury to be effective, and to the 1931 proposed draft of the American Law Institute Code of Criminal Procedure and the Commentary thereto adopting such State practice.

After the first and second preliminary drafts of the Rules were published, the Advisory Committee received comments proposing that consent of the government and approval of the court should not be a condition of non-jury trials. Orfield, *Trial by Jury in Federal Criminal Procedure*, 1962 Duke L. J. 29, 69-72. Objections similar to those made by petitioner here were made to the drafts: "With respect to subdivision (a) some thought it undesirable to require the approval of the court and the consent of the Gov-

ernment for a waiver of jury trial. The Constitution ought not to be construed as guaranteeing trial by jury to the Government, for the right to such a trial is exclusively in the defendant. Moreover, the defendant may waive the right to counsel, to a speedy trial, to compulsory process, and to confrontation of witnesses. Since all these safeguards are enumerated in the same section of the Constitution as the right to jury trial, why require consent of the Government as to the latter and not as to the former? The approval of the court should not be required either." *Id.*, p. 69. A Committee of the Chicago Bar Association recommended striking the language "with the approval of the court and the consent of the Government" and substituting "after being informed of his rights by the court voluntarily waives a jury trial." *Id.* p. 72; Stewart, *Comments on Federal Rules of Criminal Procedure*, 8 John Marshall L. Q. 296, 301 (1943).⁵ The Advisory Committee, however, did not change its recommendation, this Court promulgated the Rule as proposed, and Congress, by allowing it to become effective (see 18 U.S.C. 3771), adopted it.

Both this history of the adoption of Rule 23(a) and the policy considerations discussed above refute the contention of the *amici curiae* (brief for *Joni Rabino-witz*, pp. 5-6; brief for *Nicholas Jacop Uselding*, pp. 11-13) that the requirement that the government and the court consent was intended solely to insure that in seeking trial by the court the defendant acted

⁵ Mr. Stewart was a member of the Chicago Bar Association committee.

voluntarily and exercised an informed and competent judgment. For the objections made to the Advisory Committee's preliminary drafts plainly were based on the assumption that under the proposed rule the court and the government always had the option of compelling a jury trial by withholding consent. If the Rule were intended to limit withholding of consent to situations where the defendant's waiver was involuntary or uninformed, the objectors would have had no occasion to make their broad attack on the Rule. Indeed, it is difficult to see why they would even have objected to such a narrow provision.

Moreover, the opinions in *Patton* and *Adams* themselves make it clear that the purpose of requiring consent was not solely to insure that the defendant had made an intelligent choice in seeking trial by the court. In *Patton*, the Court stated (281 U.S. at 312) that consent of the government and the court must be had "in addition to the express and intelligent consent of the defendant," and that requiring such additional consent was necessary because "the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions." The Court reiterated this view in *Adams*, pointing out (317 U.S. at 277-278) that it had held in *Patton* that a defendant "may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the trial court."

Finally, the Advisory Committee's notes themselves refute the *amici's* contention. The Committee stated: "The provision for a waiver of jury trial by the defendant embodies existing practice, the constitutionality of which has been upheld [citing *Patton and Adams*]." (Notes of Advisory Committee on Rules, 18 U.S.C. App. p. 3423.) At the time the rules were adopted, the "existing practice" was that unless the government and the court consented, a defendant's waiver of trial by jury was ineffective. As the *amicus* Uselding himself recognizes (Br. 10-11), prior to the effective date of the rules in 1946, three courts of appeals had expressly held that where the government refused to consent to a waiver, the defendant was required to be tried by a jury. *United States v. Dubrin*, 93 F. 2d 499, 505 (C.A. 2), certiorari denied, 303 U.S. 646; *Rees v. United States*, 95 F. 2d 784, 790-791 (C.A. 4); *C.I.T. Corp. v. United States*, 150 F. 2d 85, 91-92 (C.A. 9).

We recognize, of course, that in a particular case a prosecutor's decision whether to consent to trial by the court may be based largely on considerations of litigation strategy—that is, his judgment as to which mode of trial offers the best prospect of success. We submit that the prospect of success is no less proper a factor for the prosecution to consider in determining whether to consent to trial by the court than for the defense to consider in deciding whether to insist on trial by jury. The function of the prosecutor is to prosecute violations of the law, and it is "his duty * * * to use every legitimate means to bring about a just [conviction]" (*Berger v. United States*, 295 U.S.

78, 88). "Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses." (*Patton v. United States*, 281 U.S. at 312; see *supra*, pp. 12-14, 20-21.) Particular judges may have the reputation of having fixed attitudes toward certain types of cases and individuals, and it is wholly proper for the prosecutor to conclude that in such a case the administration of justice will be better served by having the defendant's guilt or innocence determined by the jury rather than by the judge. For the public interest requires not only protection of the rights of the defendant, but also fairness to the prosecution in order to insure that the guilty do not improperly escape just punishment for their crimes.

Congress has recognized that the government has an interest in the composition of the jury, and has legislated in this respect. In 1855, this Court held that the recognition in the Act of 1790 of the right of peremptory challenge by a defendant in treason and capital cases did not also cover the qualified right, existing at common law, of the government to challenge. *United States v. Shackelford*, 18 How. 588. Shortly thereafter Congress passed the Act of 1872, 17 Stat. 282, regulating the number of challenges, and giving the government the right of peremptory challenge (5 for capital cases, 3 for others). And, interestingly, the number of peremptory challenges allowed the government has been increased over the years (raised to 6 for the government in all cases in the 1911 judicial code, 36 Stat. 1166, and to an equal

number with defendant (20) in capital cases by Rule 24(b)).

2. *The petitioner has shown no particular circumstances which might dictate against trial by jury in this case*

Even if, contrary to our argument, there might be circumstances in which a defendant's reasons for wanting to be tried by the court were so compelling that the government's refusal to agree, unless explained, might be deemed arbitrary, this plainly is not such a case. The only reason which petitioner gave for not wanting a jury was to shorten the trial (R. 17). That argument, of course, could be made in virtually every case. For trial before the court avoids many time-consuming events that occur if a jury is used, such as *voir dire* examination of jurors, summations by counsel, detailed instructions by the court, removal of the jury from the courtroom while counsel argue non-evidentiary questions before the judge, etc.

Petitioner argues (Br. 24), however, that there are "occasions when a jury might be influenced by passion, prejudice, or public feeling, or lack sufficient knowledge, experience, or insight to give the defendant a fair trial. Often, the subject matter may be too technical or too involved for the jury." But, once again, this is not such a case. On the contrary, as we have shown (*supra*, p. 27), the issues in this mail fraud case were particularly appropriate for determination by a jury. For twelve representative members of the community usually are better able than a single legally-trained individual to determine whether a defendant had the intent to defraud or

acted in good faith. Nothing in this record even suggests that the jury may have been motivated by improper considerations or that it was unable properly to evaluate the evidence. The petitioner can hardly claim that he was treated unfairly because in his case there was followed the usual practice of letting a jury determine his guilt or innocence. "It cannot be conceived how a trial by a jury, presided over by a judge, could possibly be prejudicial to an accused" (*Rees v. United States*, 95 F. 2d 784, 790 (C.A. 4)).

II

NEITHER THE INSTRUCTIONS OF THE COURT, NOR ANY STATEMENTS OF THE PROSECUTOR DENIED PETITIONER A FAIR TRIAL

In addition to his claim that he had a constitutional right to be tried by the court, petitioner also contends (1) that the district court's instructions to the jury were inadequate and erroneous, and (2) that certain statements of the prosecutor denied him a fair trial. Neither contention has substance.

A. THE COURT'S INSTRUCTIONS WERE PROPER

The court properly explained the elements of the offense of mail fraud to the jury. After telling the jury that it must find a scheme devised with intent to defraud, the court explained that "[t]o act with 'intent to defraud' means to act knowingly and with the specific intent to deceive, for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself" (R. 69). It

advised the jury (R. 72) that only conscious fraud is punishable, cautioning that "although men may be visionary in their plans and believe they will succeed, yet in spite of the ultimate failure of the concern, they may be wholly innocent of committing a conscious fraud." It instructed that petitioner should be acquitted if he acted in good faith "no matter how visionary might seem the plan or judgment of the defendant" (R. 71-72). The court also explained that the "effect of the representations that were made is to be determined by the impression they would likely produce upon a mind of ordinary prudence and comprehension. If the representations are designed to mislead they are proscribed by the statute" (R. 74). Contrary to petitioner's contention (Pet. 35), the government was not required to show that the victims of the fraud relied upon the representations to their detriment. "It is enough if, having devised a scheme to defraud, the defendant with a view of executing it deposits in the post office letters, which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor" (*Durland v. United States*, 161 U.S. 306, 315).

2. The court told the jury that the only way intent could be proved was by circumstantial evidence (R. 67). It charged that all the circumstances necessary to show guilt must be consistent with each other and with defendant's guilt and must be inconsistent with any reasonable theory except that of guilt (R. 67). It then charged the jury that if all the circumstantial evidence measured up to the foregoing requirements,

it should return a guilty verdict (R. 67). Read in context, the instruction would not have misled the jury, as petitioner contends (Br. 35-36), into basing its determination solely upon circumstantial evidence. On the contrary, the court specifically instructed the jury that its decision whether the defendant was guilty or innocent was to reflect "all the evidence * * *" (R. 65).

3. The court did not instruct, as petitioner contends (Br. 36), that the jury must reject all the testimony of a witness if he testified falsely as to any matter. The court charged (R. 66) that a "witness false in one part of his or her testimony is to be distrusted in others"; and that the jury may reject all of the testimony of a witness who has wilfully sworn falsely to a material point and must treat such testimony with distrust and suspicion "and reject all unless they shall be convinced that notwithstanding the base character of the witness, that he or she has, in other particulars sworn to the truth."⁶ This was a correct statement of the law governing the weight to be given to testimony of a witness who testified falsely as to any material matter. See *Shelton v. United States*, 169 F. 2d 665, 667 (C.A.D.C.), certiorari denied, 335 U.S. 834; *United States v. Rutkin*, 189 F. 2d 431, 438 (C.A. 3), affirmed on other grounds, 343 U.S. 130.

4. As noted above, the court instructed the jury that petitioner should be acquitted if he acted in good faith, and explained the meaning of that term (R. 71-

⁶ In deciding to give such an instruction the trial court did not, contrary to petitioner's contention (Br. 36), abuse its discretion.

72). The claim of good faith was petitioner's defense. If petitioner desired instructions concerning any other theory of defense he should have requested them. *Apel v. United States*, 247 F. 2d 277, 282-283 (C.A. 8).⁷

B. THE PROSECUTOR'S STATEMENTS WERE PROPER, AND IN ANY EVENT DID NOT PREJUDICE PETITIONER

1. Petitioner contends (Br. 38-39) that in his opening statement government counsel should not have referred to the anticipated testimony of a Mr. Berg. The prosecutor stated (R. 40) that "Mr. Berg was engaged in dealing with amateur songwriters with Mr. Singer for the period of mid. '55 through 1957. The business transaction engaged in by Mr. Berg and Mr. Singer are not part of the indictment. The question before the jury is fraudulent intent." Subsequently the court ruled, however, that Berg's testimony was inadmissible on the issue of fraudulent intent because it was too remote in point of time (R. 59-60). Both during the trial and in his instructions, the judge told the jury that it was to decide the case on the basis of the evidence, and not "on the basis of the opening statement of either side or of arguments of counsel" (R. 63, 66). The reference in the opening statement to Mr. Berg was a permissible

⁷The objection to the instructions on presumption of innocence and reasonable doubt (Pet. Br. 37), not raised in the petition for a writ of certiorari, are likewise without merit. The court charged (R. 70) that the defendant is "at all times clothed" with the presumption of innocence. The instructions as to reasonable doubt met the standard of *Holland v. United States*, 348 U.S. 121, 140.

statement of what the prosecutor hoped to prove; it was not prejudicial to petitioner; and any possibly adverse effect was cured by the court's instruction that the jury was not to rely on it.

In his opening statement, the prosecutor also indicated (R. 35-36) that the reason the Madhatters song group was willing to record the songs was not because they wished to exploit them commercially, as had been represented, but because they had an arrangement with the Ralph E. Hastings Company to sing any song for two dollars. When he asked, "Would you have bought, if you were the amateur songwriter, if you had known all of that information," the court sustained an objection that the statement was argumentative, and instructed the prosecutor to "[j]ust state what you are going to prove" (R. 36). This minor incident plainly was not prejudicial to petitioner.

2. The amateur songwriters were told by petitioner that an active, responsible publishing company was interested in commercially exploiting their songs. Sixteen songwriters received contracts from the Eagle Pass Music Publishing Company, which was operated by Dallas Eugene Turner. As part of the government's case, Turner, Emil Henke and Rexford Hufstедler testified about the Eagle Pass company. Turner proved to be an adverse witness (R. 55). During Turner's testimony petitioner objected to some of the government's questions on the ground that the government had not connected petitioner with Eagle Pass (Tr. 265). When the prosecutor said

that he wanted "to show that [petitioner] was interested in this company," Turner testified that petitioner was never interested in Eagle Pass. The court then instructed the jury that no witness had testified to any such interest (R. 52-53). Later Turner again testified that Singer had no financial interest in the company (Tr. 273, 276), although he stated that during the time he operated Eagle Pass, petitioner had loaned him money (Tr. 272-273). There was no impropriety in the prosecutor's explanation that the reason for his questions was to prove that petitioner was interested in the Eagle Pass company; and any possibility that the jury might believe he had proved it was eliminated when the court emphasized to the jury that he had not established that fact.

Turner testified that one Henke had an interest in the Eagle Pass company and that Turner ultimately sold the company to Henke and Hufstedler (R. 53-54). Henke testified that he had been associated with Eagle Pass (Tr. 562). When the government asked Henke whether he had invested any money in Eagle Pass, the court sustained petitioner's objection, ruling that "[i]t is immaterial unless you intend to trace it to the Singers" (R. 61). The prosecutor said that he expected a negative answer, and the court then instructed the jury to disregard this statement and admonished the prosecutor to learn the rules of evidence (R. 61). Later, on cross-examination Henke stated that Turner gave him an interest in the company (Tr. 574) and that he had purchased Turner's interest in November 1958 (Tr. 577). The prosecution was not allowed to inquire into the price (Tr. 583).

Petitioner was not prejudiced by these statements. Indeed, the court's rulings were more favorable to petitioner than necessary. In proving the charge that the song writers were led to believe that a responsible publishing firm was ready to print these songs, it would have been permissible for the prosecution to show that the firm involved was so insubstantial that it was sold for an insignificant price or was given away. Certainly the prosecutor was justified in explaining what he was trying to develop. In any event, the court's instruction to the jury to disregard the statement eliminated any possible prejudice. As to the other portions of the record to which petitioner refers (R. 54, 57-58, 63-64), none of the questions asked reveals any basis for imputing improper conduct to the prosecutor.

3. Dallas Turner testified that he saw Hufstedler sign a document pertaining to the Eagle Pass company indicating that Henke and Hufstedler had become his partners (R. 54-55). Henke stated he never knew Hufstedler (Tr. 572). Hufstedler testified that he had never been a partner of Turner (R. 62). When shown the document, Hufstedler stated that he had not signed it but that "[t]his could be my signature or a copy of my signature" (R. 62). Hufstedler also stated that he allowed Turner to use some of his office space (Tr. 685).

Petitioner claims (Br. 42) that he was prejudiced by the prosecutor's description in his closing argument of Hufstedler's signature on the document as a "forgery" (R. 98). We believe that this remark was a reasonable inference from Hufstedler's testimony.

In any event, the court immediately instructed the jury to disregard the statement, and then permitted the prosecutor to read to the jury the transcript of Hufstedler's testimony on that point (R. 98). At the conclusion of the prosecutor's argument, the defense was permitted to read to the jury the cross-examination of Hufstedler bearing on this question (R. 103-104). Since (1) the evidence justified the inference that Hufstedler's signature was false, (2) the testimony relating to that issue was read to the jury, and (3) the court instructed the jury to disregard the prosecutor's statement, petitioner could not have suffered any prejudice from the prosecutor's colloquial description of the signature as a "forgery."

The lack of merit to the other objections to the closing argument is evident from the face of the challenged remarks and is underscored by the failure of experienced trial counsel to except to them.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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